

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

R. E. LEE and STANDARD ACCIDENT AND  
INSURANCE COMPANY, a corporation,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Montana

FILED

NOV 23 1942

PAUL P. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

R. E. LEE and STANDARD ACCIDENT AND  
INSURANCE COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Montana





## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer to Complaint.....	26
Exhibit 1—Application for Consent to Surrender Oil and Gas Min- ing Lease Made by R. E. Lee to Secretary of Interior, Dec. 4, 1936 .....	37
Exhibit 2—Letter Dated February 3, 1938, to Ira L. Quiat, Esq., from Secretary of Interior, Declar- ing Oil and Gas Lease Can- celled .....	39
Appeal:	
Certificate of Clerk to Transcript of Rec- ord on .....	148
Designation of Contents of Record on (DC)	146
Notice of .....	79
Order for Transmission of Original Ex- hibits on .....	147
Statement of Points on Appeal and Desig- nation of Record on (CCA).....	150

Index	Page
Certificate of Clerk to Transcript of Record on Appeal .....	148
Complaint .....	2
Exhibit A—Agreement and Lease, Dated Sept. 26, 1935, Between Black- feet Tribe of Indians and R. E. Lee .....	9
Exhibit B—Bond, R. E. Lee, Principal and Standard Accident Insur- ance Company, Surety, Dec. 10, 1935 .....	21
Exhibit C—Notice to Show Cause Why Lease Should Not Be Cancelled to R. E. Lee, July 9, 1937, from Secretary of Interior.....	24
Conclusions of Law (as Adopted).....	63
Conclusions of Law (as Proposed).....	73
Cross-Motion for Judgment on Pleadings.....	43
Designation of Contents of Record on Appeal (DC) .....	146
Designation of Contents of Record on Appeal (CCA) .....	152
Findings of Fact and Conclusions of Law (as Adopted) .....	58
Findings of Fact and Conclusions of Law (as Proposed) .....	64

Index	Page
Judgment .....	77
Motion, Cross, for Judgment on Pleadings....	43
Motion for Judgment on the Pleadings.....	41
Motion to Amend Answer.....	46
Exhibit 3—Statement of R. E. Lee Filed with Secretary of Interior Showing Cause Why Lease Should Not Be Cancelled.....	50
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	79
Opinion of the Court.....	74
Order Denying Motions for Judgment on the Pleadings .....	45
Order for Transmission of Original Exhibits to C.C.A. ....	147
Record of Trial.....	56
Statement of Points and Designation of Con- tents of Record on Appeal (CCA).....	150
Transcript of Evidence.....	80
Exhibits for Defendant:	
2—Letter dated Dec. 4, 1936, from R. E. Lee to Secretary of Interior, asking permission to surrender lease .....	84

Index	Page
Exhibits for Defendant—(Continued):	
3—Letter dated Dec. 19, 1936, addressed to C. L. Graves, Supt., Blackfeet Indian Agency, signed H. J. Duncan, Supervisor . . . . .	87
4-5—Official Receipts showing payments in full of bonus due and advance royalty or annual rent due during first year of lease . . . . .	90
6—Official Receipt for \$1 surrender fee paid by R. E. Lee at time of Application for Surrender . . . . .	93
7—Article 27 of “Regulations Governing Leasing of Tribal Lands”, approved by Secretary of Interior on July 23, 1924 . . . . .	95
8—Formal Notice of Intent to Abandon Well, filed by R. E. Lee, with Department of Interior Geological Survey . . . . .	97
9—Formal Report of Subsequent Report of Abandonment of Well . . . .	100
10—Statement filed with Secretary of Interior by R. E. Lee showing cause why lease should not be cancelled . . . . .	104

**Index**

**Page**

**Exhibits for Defendant—(Continued):**

11—Copy of letter to Secretary of Interior, Nov. 17, 1937, from Assistant Commissioner of Indian Affairs .....	111
--	-----

**Exhibit for Plaintiff:**

1—Letter to Ira L. Quiat, Attorney for R. E. Lee, from William Zimmerman, Jr., Commissioner.....	81
--	----

**Witnesses for Defendant:**

**Hupp, J. E.**

—direct .....	119
—cross .....	137
—redirect .....	141

**Lee, R. E.**

—direct .....	114
—cross .....	119



NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

HONORABLE JOHN B. TANSIL,  
United States District Attorney,

HONORABLE R. LEWIS BROWN,  
Assistant United States District Attorney,  
Butte, Montana.

Attorneys for Plaintiff and appellee.

MR. JOHN E. CORETTE,  
MR. JOHN E. CORETTE, JR.,  
MR. ROBERT D. CORRETTE,  
MR. WILLIAM A. DAVENPORT,  
MR. KENDRICK SMITH,  
Butte, Montana.

Attorneys for Defendants and appellants.

[1\*]

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States  
District of Montana  
Great Falls Division

No. 150

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

R. E. LEE and STANDARD ACCIDENT  
INSURANCE COMPANY, a Corporation,  
Defendants.

### COMPLAINT

Comes now the plaintiff above named, United States of America, by and through John B. Tansil, duly appointed, qualified and acting Attorney of the United States, in and for the District of Montana, at the direction of the Attorney General of the United States, and at the request of the Secretary of the Interior of the United States, in the name of the United States, in its own behalf and for the use and benefit and in behalf of the Black-foot Tribe of Indians, wards of the said plaintiff, and for cause of action against the defendants complains and alleges as follows, to-wit:

#### I.

That this Court has jurisdiction hereof by reason of the provisions of Section 41 of Title 28, U. S. Code.



## II.

That at all of the times mentioned herein the plaintiff was, is and continues to be the owner in fee simple of the following described real property, situated, located and being upon and within the Blackfeet Indian Reservation, in the County of Glacier, in the State and District of Montana, to-wit:

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4, Section 27, T. 33, N., R. 6 W., M. P. M.

SW/4, W/2 NW/4 NE/4, SE/4, Section 26, T. 33 N., R. 6 W., M. P. M.;

W/2 W/2 SW/4, Section 25, T. 33 N., R. 6 W., M. P. M., containing 470 acres

together with all of the oils and minerals contained beneath the [3] surface of said property, said land, oils and minerals, however, being held by the United States for the use and benefit of the Blackfeet Tribe of Indians, its ward, and its Indian wards residing upon the said Blackfeet Indian Reservation and members of said Tribe.

## III.

That at all of the times herein mentioned the defendant, Standard Accident Insurance Company, a Corporation, was, continued to be and now is a corporation duly and regularly organized and existing, and as such authorized and empowered to be, act and become a surety.

## IV.

That on or about the 26th day of September, 1935, the Blackfeet Tribe of Indians, acting by and through the Superintendent and Special Disbursing Agent of said Tribe, and the defendant, R. E. Lee, entered into a certain agreement and lease, in writing, a copy of which said lease and agreement is hereto attached, marked Exhibit "A", and hereof made a part as fully and completely as though here set out in haec verba, and that the said lease so made as aforesaid was duly and regularly approved by the Secretary of the Interior on the 24th day of January, 1936.

## V.

That the said lease provided, among other things, as follows:

"And before this lease shall become effective the lessee shall furnish a satisfactory bond as required by the regulations."

## VI.

That thereupon and in compliance with the regulations and in order that the said lease become effective, the said R. E. Lee, as principal, and the said Standard Accident Insurance Company, a corporation, as surety, duly and regularly, on the 10th day of December, 1935, made, executed and delivered to the plaintiff its certain instrument in writing and bond, a full, true [4] and correct copy

of which is hereto attached, marked Exhibit "B", and hereof made a part as fully and completely as though here set out in haec verba.

#### VII.

That the said bond was approved on the 24th day of January, 1936, by the Secretary of the Interior, and thereupon the said lease became and was effective and continued in full force and effect until the same was cancelled, as hereinafter set out and that the said bond became effective upon its approval on January 24, 1936, and during all the times herein mentioned was, continued to be and now is in full force and effect.

#### VIII.

That the said lease, Exhibit "A", provided in part as follows:

"(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days from date of the approval hereof by the Secretary of the Interior, and to drill at least (Four) wells on the premises within one year from the date of such approval \* \* \*. If the lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve

the lessee or surety from the covenants and obligations to pay any accrued obligation.”

### IX.

That thereafter and after the said lease became in full force and effect, the defendant, R. E. Lee, entered into and upon the above described real estate and premises and took possession thereof and commenced drilling operations thereon, but that the said lessee did not drill four wells upon the said premises within one year from the date of the approval of the said lease, or at all, as he had promised and agreed to do, and wrongfully failed, refused and neglected to drill the said four wells upon the said leased premises, or any part thereof, within one year from the date of the approval of the said lease, or at all, as he had promised and agreed to do. [5]

### X.

That it was further provided in said lease in part as follows:

“(10) In the event of failure or neglect of the lessee to perform any obligations under this lease, the Secretary of the Interior shall have the right, at any time after thirty days’ notice to the lessee specifying the terms and conditions violated, to cancel this lease.”

### XI.

That on the 9th day of July, 1937, the said defendant, R. E. Lee, then being in default in said

lease and not having drilled four wells upon the leased premises, or any part thereof, within one year from the date of approval of the lease, or at all, as he had promised and agreed to do, the Secretary of the Interior, on said 9th day of July, 1937, gave to the said R. E. Lee a notice in writing as provided in said lease, a copy of which said notice is hereto attached, marked Exhibit "C", and hereof made a part as fully and completely as though here set out in haec verba.

## XII.

That the said R. E. Lee failed, refused and neglected to show cause, as required by said notice, within thirty days, or at all, why the said lease should not be cancelled and the said R. E. Lee still being in default as aforesaid, under the terms and conditions of the said lease, and having breached the same, the Secretary of the Interior did, on the 20th day of January, 1938, duly and regularly cancel the said lease, and declared the said bond, Exhibit "B", forfeited.

## XIII.

That it was provided in part in said lease, as follows:

"(4) \* \* \* It is further understood and agreed that if the said lessee shall fail or refuse to drill as provided herein, or fail to obtain an extension of the time within which to drill he shall pay to the officer in charge, for

the benefit of the Blackfeet Tribe of Indians, the full amount for which this lease is bonded." [6]

#### XIV.

That the defendant, R. E. Lee, did not obtain any extension of time within which to drill or to perform the drilling operations required of him to be performed under said lease.

#### XV.

That thereafter and on the 3rd day of February, 1938, a demand was made upon the defendants for the payment of the sum of \$6,000.00, the amount specified as the amount of said bond, within thirty days from the said 3rd day of February, 1938, but that the said defendants failed, refused and neglected to pay the said sum of \$6,000.00, or any part or portion thereof, within thirty days from February 3, 1938, or at all, and there is now due, owing and wholly unpaid from the defendants to this plaintiff the said sum of \$6,000.00, with interest thereon at the rate of 6% per annum from the 3rd day of February, 1938.

#### XVI.

That the plaintiff herein duly and regularly performed all the conditions precedent on its part to be performed under said lease and said agreement.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of \$6,000.00, together with interest thereon at the rate



of 6% per annum from the 3rd day of February, 1938, and for the plaintiff's costs of suit herein necessarily expended.

R. LEWIS BROWN,

Assistant Attorney of the  
United States, in and for  
the District of Montana.

[Endorsed]: Filed Dec. 18, 1939. [7]

---

EXHIBIT "A"

5-157 OIL & GAS LEASE NO. 129

Oil and Gas Mining Lease  
Tribal Indian Lands

This Lease made and entered into, in triplicate on this 26th day of September, A. D. 1935, by and between Warren L. O'Hara, Sup't & S.D.A., acting for and in behalf of the Blackfeet Tribe of Indians, in accordance with the resolution dated July 10, 1935, of the Blackfeet Tribal Council, party of the first part, designated as lessor, and R. E. Lee of Cut Bank, Montana, party of the second part, designated as lessee, under and in pursuance of Section 3 of the Act approved February 28, 1891 (26 Stat. L., 795), as amended by the Act approved May 29, 1924 (Public No. 158, 68th Congress), Witnesseth:

1. The lessor, in consideration of one dollar, the receipt whereof is acknowledged, and of the royal-

ties, covenants, stipulations, and conditions herein contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for five years from the date of approval hereof, and as long thereafter as oil or gas is found in paying quantities, all the oil and gas deposits in or under the lands described as follows, to-wit:

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4, Sec. 27,  
T. 33 N., R. 6 W., M. P. M.

SW/4, W/2 NW/4 NE/4, SE/4, Sec. 26, T.  
33 N., R. 6 W., M. P. M.

W/2 W/2 SW/4, Sec. 25, T. 33 N., R. 6 W.,  
M. P. M.

containing 470 acres.

2. The lessee hereby agrees to pay or cause to be paid to the officer of the United States having jurisdiction over the leased premises, hereinafter called the officer in charge, for the use and benefit of the lessor, as royalty,  $12\frac{1}{2}$  per cent of the gross proceeds of all crude oil extracted from the said lands unless the lessor, with the approval of the Secretary of the Interior, shall elect to take the royalty in oil, such payment to be made at the time of sale or removal of the oil.

Should the lessor, with the approval of the Secretary of the Interior, elect to take the royalty in oil, the lessee shall furnish free storage for the royalty oil for not exceeding thirty days.



In time of war or other public emergency any of the executive departments of the United States Government shall have the option to purchase at the highest posted market price on the date of sale all or any part of the oil produced under this lease.

The royalty on gas, whether it shall be gas from which the casing-head gasoline has been extracted or otherwise, shall be  $12\frac{1}{2}$  per cent of the value thereof in the field where produced when the average daily production for the calendar month from the land leased is less than [8] 3,000,000 cubic feet, and  $16\frac{2}{3}$  per cent of the value thereof when the average daily production for the calendar month is 3,000,000 cubic feet or more: Provided, That where wells produce both oil and gas or oil and gas and water to such an extent that the gas is unfit for ordinary domestic purposes, but is used temporarily in connection with drilling and pumping operations on adjacent or near-by tracts, the lessee shall pay royalty at the rate of  $12\frac{1}{2}$  per cent of the gross proceeds of the sale of gas from such wells. Failure on the part of the lessee to use a gas producing well which can not profitably be utilized at the rate herein named shall not work a forfeiture of this lease so far as it relates to mining oil, but if the lessee desires to retain gas-producing privileges he shall pay a rental of \$100 per annum in advance, calculated from the date of the discovery of gas on each gas-producing well, the gas from which is not marketed nor utilized other than for operations under this lease.

On casing-head gas used or sold for the manufacture of casing-head gasoline, the rate of royalty shall be  $12\frac{1}{2}$  per cent of the value of the casing-head gas, which value shall be determined and computed on the basis and in the manner provided in the regulations governing the utilization of casing-head gas produced from oil wells on restricted Indian lands. In cases where gas produced and sold has a value for drip gasoline, casing-head gasoline content, and as dry gas from which the casing-head gasoline has been extracted, then the royalties above provided shall be paid on all such values. The lessor shall have the right to the use of gas delivered at the well or at the nearest trunk line for any desired school or other building belonging to the tribe, but the lessee shall not be required to pay royalty on gas so used. Payments of annual gas royalties shall be made within 25 days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

(3) Until a producing well is completed on said premises, the lessee shall pay, or cause to be paid, to the Superintendent of the Blackfeet Agency, for the use and benefit of the lessor, as advance rentals one dollar per acre per annum from the date of approval of this lease. It is understood and agreed that such sum of money so paid shall be a credit on stipulated royalties for the year for

which the payment of advance rentals is made, and the lessee hereby agrees that said advance rentals when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation hereof; nor shall the lessee be relieved from the obligation to pay said advance rental annually, when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days from the date of approval hereof by the Secretary of the Interior and to drill at least (Four) wells on the premises within one year from date of such approval; and to drill four wells during each successive year thereafter until as many wells have been drilled as there are forty acre tracts or fractional parts thereof included in the lease; and thereafter to diligently drill such additional wells as may be necessary and proper in the judgment of the Secretary of the Interior to fully develop the land and extract the oil and gas therefrom in accordance with the most approved methods of drilling development in the field where the lands are located. It is further understood and agreed that the completion of a well is to be considered a minimum depth of one hundred (100) feet into the Madison limestone, unless production in paying quantities is found at a lesser depth. If the [9] lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a

violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation; Provided, That the Secretary of the Interior may, in his discretion, upon application of the lessee, extend the time within which any well shall be commenced upon the payment of annual rental of one dollar per acre, for each whole year the beginning of such well is delayed. For the guidance of the Secretary of the Interior, the Blackfeet Tribal Business Council will be consulted as to its opinion in this matter. It is further understood and agreed that if the lessee shall fail or refuse to drill as provided herein, or fail to obtain an extension of the time within which to drill he shall pay to the officer in charge, for the benefit of the Blackfeet Tribe of Indians, the full amount for which this lease is bonded.

The lessee further agrees to drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof to compensate the lessor for the estimated loss of royalty through drainage. During the period of supervision by the Secretary of the Interior the necessity for offset wells shall be determined by the officer in charge and payment in lieu of drilling and producing shall be in an amount determined

by the officer in charge subject to the right of appeal to the Secretary of the Interior and paid as provided in section 2 of this lease.

S/ R. E. LEE,  
Lessee.

Subscribed and sworn to before me this 12th day of November, 1935.

[Notarial Seal]

L. B. MERRILL,  
Notary Public

It is agreed that the above be made a material and binding part of oil and gas lease No. 129.

STANDARD ACCIDENT IN-  
SURANCE CO.,

By L. B. TEPLING,  
Its Attorney-in-Fact

[Corporation Seal] Surety.

By ALBERT D. DAY,  
Its Attorney-in-Fact

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land, and suffer none to be committed upon the portion in his occupancy or use, take good care of the same, and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove any casings in producing wells, or, without the written consent of the



lessor, remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, excepting tools, derricks, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control, nor allow any intoxicating liquors to be sold or given away [10] for any purposes on such premises; shall not use such premises for any other purposes than those authorized in the lease, and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil or gas bearing strata. Failure to so plug a well as to effectually shut off the water from the oil or gas strata shall be a violation of one of the material and substantial terms and conditions of this lease. The lessee agrees that if a nonproducing oil and gas well develops usable water it may be turned over to the reservation without plugging and on such terms as may be agreed upon by the contracting parties, it being, however, definitely understood that the lessor shall in no case be required to pay more than the actual market value of whatever casing is left in the well in order to secure the same for the reservation.

6. The lessee shall keep an accurate account of

all oil mining operations showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property, and also upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease canceled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder: Provided, That if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.

8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental *or* acreage, unless agreed to by both parties.

9. The lessee hereby agrees that he will not assign or sublet any part of the lands herein leased without the written consent of the Secretary of the

Interior being first obtained. The assignment of this lease or any interest therein without such written consent shall constitute a violation of one of the material and substantial terms and conditions of this lease and be cause for cancellation thereof.

10. In the event of failure or neglect of the lessee to perform any obligations under this lease, the Secretary of the Interior shall have the right, at any time after thirty days' notice to the lessee specifying the terms and conditions violated, to cancel this lease.

11. The lessee agrees that he will keep all highways on the reservation used by him in as good state of repair as he finds the same.

12. This lease is made and accepted subject to existing law and any laws hereafter enacted by Congress as to the said lands, also to the regulations relative to such leases heretofore or hereafter prescribed by the Secretary of the Interior, and in no event shall the United States or the Secretary of the Interior be liable for damages or otherwise under the provisions hereof, and before this lease shall become effective the lessee shall furnish a satisfactory bond as required by the regulations. The obligations and agreements hereinbefore expressed shall extend to and be binding upon the successors in interest of the parties hereto. [11]

In Witness Whereof, the said parties have here-



unto subscribed their names and affixed their seals  
on the day and year first above mentioned.

WARREN L. O'HARA,

Special Disbursing Agent

By H. M. KNUTSON,

Deputy Disbursing Agent.

[Seal] R. E. LEE

Two Witness to Lessee

JAMES H. McCOURT

W. L. EWING

# ACKNOWLEDGEMENT OF INDIVIDUAL

State of Montana,

County of Glacier—ss.

Before me, a notary public in and for said county  
and State, on this 12th day of November, 1935, per-  
sonally appeared R. E. Lee, to me known to be the  
identical person who executed the within and fore-  
going lease, and acknowledged to me that he exe-  
cuted the same of his free and voluntary act and  
deed for the uses and purposes therein set forth.

[Notarial Seal]

L. B. MERRILL,

Notary Public, Residing at

Cut Bank, Montana.

My commission expires March 22, 1936.

Department of the Interior,  
United States Indian  
Service,  
Blackfeet Agency,  
Browning, Montana

December 12, 1935.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

WARREN L. O'HARA,  
Special Disbursing Agent.

By H. M. KNUTSON,  
Deputy Disbursing Agent.

[12]

Office of Indian Affairs,

Washington, D. C., Jan. 3, 1936

Respectfully submitted to the Secretary of the Interior with recommendation that it be approved.

T. E. MURPHY,  
For the Commissioner.

Washington, D. C., Jan. 24, 1936

The within lease is Approved.

T. A. WALTERS,  
First Assistant Secretary of  
the Interior. [13]

Department of the Interior  
Office of the Secretary  
Washington, D. C.

Jan. 20, 1938

Lease Cancelled, and lessee and his surety held for the full amount of the bond given in connection with the lease, and for the proper conditioning of the leased premises.

OSCAR L. CHAPMAN

Assistant Secretary. [14]

---

EXHIBIT "B"

5-157c

To Accompany Mining Leases of Tribal Lands

BOND

Know All Men By These Presents, That R. E. Lee, of Cut Bank, Montana, as principal, and Standard Accident Insurance Company, a corporation, of Detroit, Michigan, as surety, are held and firmly bound unto the United States of America in the sum of Six Thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, successors, executors, administrators, or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of December, 1935.

The Condition Of This Obligation Is Such, that whereas the above-bounden R. E. Lee, as principal, entered into a certain indenture of lease, dated September 26, 1935, with the officer in charge of the Blackfeet Tribe of Indians for the lease of a tract of land described as follows:

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4 of Section 27, Twp. 33N., Rge. 6W.;

SW/4, W/2 NW/4 NE/4, SE/4 of Section 26, Twp. 33N., Rge. 6W.;

W/2 W/2 SW/4 of Section 25, Twp. 33N., Rge. 6W., containing 470 acres,

and located in Blackfeet Reservation, for oil and gas drilling purposes for the period of Five (5) years, from the date of approval hereof, and as long thereafter as oil or gas is found in paying quantities.

Now, if the above-bounden R. E. Lee shall faithfully carry out and observe all the obligations assumed in said indenture of lease by him and shall observe all the laws of the United States, and regulations made, or which shall be made thereunder, for the government of trade and intercourse with Indian tribes, and all the rules and regulations that have been or may be, lawfully prescribed by the Secretary of the Interior relative to leases [15] executed on the Blackfeet Reservation, in the State of Montana, then this obligation shall be null and void; otherwise to remain in full force and effect.

Signed and sealed in the presence of——  
(Sgd.) R. E. LEE

Witnesses:<sup>1</sup>

JAMES H. McCANRT

P. O. Cut Bank, Mont.

W. L. EWING

P. O. Cut Bank, Mont.

as to [Seal] R. E. LEE

GRACE HURIN

P. O. Helena, Montana

ELIZABETH WARDLAW

P. O. Helena, Montana

as to [Seal] STANDARD ACCIDENT IN-  
SURANCE CO.

By L. B. TEPLING

Its Attorney-in-Fact

By ALBERT D. DAY

Its Attorney-in-Fact

DEPARTMENT OF THE IN-  
TERIOR

Washington .....

This bond terminated only  
as to liabilities accruing  
after .....

Assistant Secretary

---

<sup>1</sup>Two witnesses to all signatures.

## Department of the Interior

Washington, D. C. Jan. 24, 1936.

Approved:

T. A. WALTERS

First Assistant Secretary.

Sig. [16]

---

EXHIBIT "C"

L-C&amp;G

12831-37

HFL

Jul. 9, '37

Mr. R. E. Lee

Cut Bank, Montana.

Dear Sir:

Consideration has been given here to your application for the cancellation of Blackfeet tribal oil and gas mining lease No. 129 and termination of liability under a bond given in connection with the lease. The lease covers two separate tracts described as follows:

Tract No. 1, the  $E\frac{1}{2}$   $E\frac{1}{2}$   $E\frac{1}{2}$   $W\frac{1}{2}$   $NE\frac{1}{4}$  of Section 27;  $E\frac{1}{2}$   $SE\frac{1}{4}$  of Section 27,  $SW\frac{1}{4}$  Section 26, all in Twp. 33 N., R. 6 W., in Montana, containing 250 acres.

Tract No. 2,  $W\frac{1}{2}$   $NW\frac{1}{4}$   $NE\frac{1}{4}$  and  $SE\frac{1}{4}$  of Section 26;  $W\frac{1}{2}$   $W\frac{1}{2}$   $SW\frac{1}{4}$  of Section 25, all

in Twp. 33 N., R. 6 W., in Montana, containing 220 acres.

The lands involved were sold at the lease sale held September 25, 1935. The following is quoted from the notice of sale: "Each of the above described tracts will be offered for sale separately but any bidder purchasing a lease on two or more tracts may include the same in one lease, the drilling obligations being carried with each tract as advertised."

The drilling obligations in Section 4 of the lease involved require commencement of drilling operations within ninety days and the drilling of four wells within one year from date of approval of the lease. The lease also provides that if the lessee shall fail or refuse to drill the required number of wells or fail to obtain an extension of time within which to drill, he shall pay for the benefit of the lessor or lessors the full amount for which the lease is bonded.

Only one well has been drilled on tribal lease No. 129. The application for cancellation of lease No. 129 is dated December 4, 1936, and was received at the Agency on December 21, 1936.

In view of the foregoing you will be allowed thirty days from date of this letter within which to show cause to the Superintendent of the Blackfeet Indian Agency why the lease should not be cancelled and you be required to pay to the Superintendent for the benefit of the Blackfeet Tribe the



sum of six thousand dollars as provided in Section 4 of the lease for failure to comply with the drilling provisions contained in said Section 4. [17]

A copy of this letter is being forwarded to the surety on the lease.

Sincerely yours,

(Signed) WILLIAM ZIMMERMAN

Assistant Commissioner

WWL-7/1

Carbon to Standard Accident Insurance Company, Detroit, Michigan. [18]

---

[Title of District Court and Cause.]

### ANSWER

Comes Now R. E. Lee and Standard Accident Insurance Company, the Defendants in the above entitled cause, and for their Answer to the Complaint of Plaintiff on file herein admit, deny and allege as follows:

### FIRST DEFENSE

1. The Complaint fails to state a claim against Defendants, or either of them, upon which relief can be granted.

### SECOND DEFENSE

1. Defendants admit the allegations contained in Paragraphs I, II, III, IV, V, VI, VIII, X, XIII and XIV.



2. In answering Paragraph VII of the Plaintiff's Complaint, these Defendants admit that the said Bond and the said Lease were approved on the 24th day of January 1936, by the Secretary of the Interior and that, thereupon, the said Lease became and was effective. These Defendants, and each of them, deny each and every allegation contained in [31] Paragraph VII of Plaintiff's Complaint, not hereinbefore specifically admitted.

3. In answer to Paragraph IX of Plaintiff's Complaint, these Defendants admit that after the said Lease became in full force and effect, the Defendant, R. E. Lee, entered into and took possession of the real estate described in the Complaint and commenced drilling operations thereon and that the said R. E. Lee, Lessee, did not drill four (4) wells upon said premises within one (1) year from the date of the approval of said Lease, or at all. These Defendants, and each of them, deny each and every allegation contained in Paragraph IX of Plaintiff's Complaint not hereinbefore specifically admitted. In this connection these Defendants, and each of them, allege that the said R. E. Lee did, within one (1) year from the date of the approval of said Lease, drill one (1) well on the premises described in Plaintiff's Complaint and covered by said Lease.

4. In answer to Paragraph XI of Plaintiff's complaint, the Defendants admit that the Secretary of the Interior, on or about July 9th, 1937, sent to the Defendant, R. E. Lee, a notice, in writing,

a copy of which is attached to Plaintiff's Complaint and marked Exhibit "C". These Defendants, and each of them, deny each and every allegation contained in Paragraph XI of Plaintiff's Complaint not hereinbefore specifically admitted.

5. In answer to Paragraph XV of Plaintiff's Complaint, the Defendants admit that on or about February 3rd, 1938, a demand was sent to an Attorney for Defendant, R. E. Lee, notifying him that said R. E. Lee had been allowed thirty (30) days within which to pay the sum of \$6,000.00, which is [32] the amount specified in the bond specifically described in Plaintiff's Complaint, and that the Defendant, R. E. Lee, refused to pay the said sum of \$6,000.00, or any part or portion thereof. The defendants and each of them deny each and every allegation contained in Paragraph XV of Plaintiff's Complaint not hereinbefore specifically admitted.

6. These Defendants deny each and every allegation contained in Paragraphs XII and XVI of Plaintiff's Complaint.

7. These Defendants, and each of them, deny each and every allegation contained in Plaintiff's Complaint not hereinbefore specifically admitted or denied.

### THIRD DEFENSE

These Defendants, as a first affirmative defense to the Complaint of Plaintiff on file in the above entitled cause allege as follows:

1. That on or about the 26th day of September, 1935, that Certain Oil & Gas Mining Lease, a copy of which is marked Exhibit "A", attached to Plaintiff's Complaint, and is hereby referred to and incorporated as a part of this First Affirmative Defense, the same as if fully set out in this First Affirmative Defense, was made and entered into by and between the Blackfeet Tribe of Indians, acting through the Superintendent and Special Disbursing Agent of said Tribe, and the Defendant, R. E. Lee, and that said Lease, so made as aforesaid, was duly and regularly approved by the Secretary of the Interior on the 24th day of January, 1936.

2. That said Oil & Gas Mining Lease provided that the Lessee should furnish a satisfactory bond, as required by the regulations and in compliance with said Lease and with the regulations, the said Defendant, R. E. Lee, as principal, and the said Defendant, Standard Accident Insurance Company, [33] a corporation, as surety, duly and regularly on the 10th day of December, 1935, made, executed and delivered to the Plaintiff that certain Bond, a full, true and correct copy of which is marked Exhibit "B", attached to Plaintiff's Complaint, and is hereby referred to and incorporated herein by reference as fully and completely as though set out herein.

3. That said Bond was approved on the 24th day of January, 1936, by the Secretary of the In-

terior, and that said Oil & Gas Mining Lease was approved on said 24th day of January, 1936, by said Secretary of the Interior, and said Oil & Gas Mining Lease thereupon became effective.

4. That said Lease, which is marked Exhibit "A", attached to Plaintiff's Complaint and incorporated by reference as a part of this First Affirmative Defense, provided in part as follows:

"7. The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease canceled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder: Provided, that if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office."

5. That the Defendant, R. E. Lee, in accordance with the provisions of said Oil & Gas Mining Lease, which is Exhibit "A", to Plaintiff's Complaint, on or about March 25th, 1936, which was as soon after the said Lease became effective as weather conditions would allow, started the drilling of a well on the  $W\frac{1}{2}W\frac{1}{2}SW\frac{1}{4}$  of Section 25, Township 33 North, Range 6 West, which land was covered by the said Oil & Gas Mining Lease; that the Defendant, R. E. Lee, completed said well in June of 1936 and that said well was a dry hole

and was plugged and [34] abandoned. That, at the request of the Plaintiff, the said well was drilled to a depth of 100 feet into the Madison limestone, although sulphur water was encountered on entering the Madison limestone, and it was ascertained that said well would not produce oil or gas in commercial quantities and that it was uneconomical, inadvisable, wasteful and useless to drill said well to a depth of 100 feet into the Madison Limestone. That said well was drilled and abandoned under the supervision of the duly constituted representative of the United States Geological Survey, located in the territory in which the land contained in the above described Oil & Gas Mining Lease is located. That said well was drilled at a total cost of approximately \$25,000.00. That said well was drilled to a total depth of 3,238 feet and was completed and abandoned on or about the 4th day of June, 1936. That prior to the completion of the above described well, five other wells were drilled in the immediate vicinity of the land covered by the said Oil & Gas Mining Lease, and these five wells were all dry holes and failed to produce oil or gas in commercial quantities and were abandoned. That the said well drilled by the said R. E. Lee, as above set forth, and the five other wells drilled in the immediate vicinity of the land described in the above described Lease, were drilled over a structural range covering all of the lands covered by the above described Oil & Gas Mining



Lease, and the geological information obtained from the drilling of the said six wells indicated that oil and gas could not be produced from the land covered by the above described Oil & Gas Mining Lease and that the drilling of an additional well or wells under the said Oil & Gas Mining Lease would be uneconomical, [35] inadvisable and wasteful and would not produce oil or gas in commercial quantities.

6. That after the completion of the said well drilled on the land covered by the above described Oil & Gas Mining Lease, the Defendant, R. E. Lee, had a study made by independent geologists of the probabilities of obtaining production of oil or gas from the land covered by the said Oil & Gas Mining Lease, and these geologists, after making a geological survey and study of the land covered by said Oil & Gas Mining Lease and of the territory in which said land was located, informed the said R. E. Lee that there was no reasonable probability of obtaining production of oil or gas from the lands covered by said Oil & Gas Mining Lease and that the drilling of an additional well or wells on said land was not justified and that the expenditure of any additional money in connection with the drilling of an additional well or wells on said land was not justified.

7. That after having completed the drilling of the above described well on the lands covered by the above described Oil & Gas Mining Lease and

after having obtained the above described geological information to the effect that there was no reasonable probability of obtaining production of oil or gas from the lands covered by the said Oil & Gas Mining Lease, and on or about December 4th, 1936, and in accordance with the provisions of Paragraph VII of said Oil & Gas Mining Lease, which Paragraph is set out in detail above, the said R. E. Lee made, executed and filed with the Secretary of the Interior of the United States of America, an application for consent to the surrender of the above described Oil & Gas Mining Lease, a copy of which application [36] is marked Exhibit "1", attached hereto, hereby referred to, and incorporated as a part of this First Affirmative Defense, the same as if set out at length herein.

8. That at the time of the filing of the said application for surrender of said Oil & Gas Mining Lease, the said R. E. Lee had paid all amounts then due, as provided in said Oil & Gas Mining Lease, and had complied with all of the requirements of said Oil & Gas Mining Lease and that said Oil & Gas Mining Lease was then in good standing and was in full force and effect, and the said R. E. Lee was not in default thereunder. That in connection with said application for consent to surrender of said Oil & Gas Mining Lease, the said R. E. Lee paid to the Secretary of the Interior of the United States of America the sum of \$1.00



and surrendered to the Secretary of the Interior all of the land covered by said Oil & Gas Mining Lease, all as required by Section 7 thereof. That said Oil & Gas Mining Lease had not been recorded.

9. That said Defendant, R. E. Lee, complied with each and every provision of Paragraph 7 of said Oil & Gas Mining Lease and did everything which he was obligated or required to do to entitle him to a cancellation of said Oil & Gas Mining Lease and to relieve himself and the Defendant, Standard Accident Insurance Company, from all obligations or liabilities thereunder, and to a cancellation without liability of the said Bond which is marked Exhibit "B", attached to Plaintiff's Complaint on file herein and incorporated as a part of this First Affirmative Defense, the same as if set out at length herein.

10. That the Secretary of the Interior of the United [37] States, without having any facts of any kind or character, upon which to support his action, refused to consent to the surrender of the said Oil & Gas Mining Lease, and the Defendant, R. E. Lee, was advised by letter dated July 9th, 1937, from the Commissioner of Indian Affairs, a copy of which letter is attached to Plaintiff's Complaint and marked Exhibit "C", and is hereby referred to and incorporated as a part of this First Affirmative Defense, the same as if set out at length herein, that the Department of the

Interior had denied his application for consent to the surrender of the said Oil & Gas Mining Lease.

11. That in view of the fact that the land covered by the above described Oil & Gas Mining Lease and the land in the vicinity thereof has been proved to be non-productive of oil or gas, and in view of the fact that there was no reasonable probability of obtaining production of oil or gas from the land covered by said Oil & Gas Mining Lease, and in view of the fact that it would have been uneconomical, wasteful, and useless to drill as additional well or wells on the land covered by the above described Oil & Gas Mining Lease, and in view of the fact that there were no facts upon which the Secretary of the Interior could refuse to consent to the surrender by the Defendant, R. E. Lee, of the above described Oil & Gas Mining Lease, the Secretary of the Interior, in refusing to consent to the surrender of said Oil & Gas Mining Lease, acted arbitrarily, unreasonably, without any facts upon which to base his action, and his action was an abuse of discretion and was contrary to law.

12. That this action of the Secretary of the Interior in denying the Defendant, R. E. Lee's application [38] for consent to the surrender by R. E. Lee of said Oil & Gas Mining Lease, was arbitrary, unreasonable, not based upon any facts or circumstances, was an abuse of discretion by and on the part of said Secretary, and was contrary to law.

13. That thereafter and on or about February 3rd, 1938, the Secretary of the Interior wrongfully and unlawfully declared said Oil & Gas Mining Lease cancelled and by letter dated February 3rd, 1938, a copy of which is marked Exhibit "2", attached hereto, hereby referred to and incorporated as a part of this First Affirmative Defense, the same as if set forth herein, informed said Defendant, R. E. Lee, that said Lease was cancelled and that he had been allowed thirty (30) days within which to pay the sum of \$6,000.00, which is the amount specified in the Bond, which is Exhibit "B" to Plaintiff's Complaint. That this action of the said Secretary was not based on any facts whatsoever, was an attempt to enforce a penalty, which is contrary to law, was an abuse of discretion, was arbitrary, unreasonable and unlawful.

14. That the said Oil & Gas Mining Lease was surrendered by the Defendant, R. E. Lee, in accordance with the provisions of Paragraph 7 thereof and that he was thereby relieved of all further obligations or liabilities thereunder and that the Defendants were thereby relieved of all obligations or liabilities under the said Bond, marked Exhibit "B", to Plaintiff's Complaint.

Wherefore, these Defendants having fully answered the complaint of plaintiff on file in the above entitled [39] cause pray that Plaintiff take nothing by virtue of his Complaint and that the

above entitled Complaint and case be dismissed against these answering Defendants.

CORETTE & CORETTE

By J. E. CORETTE, JR.

619 Hennessy Building

Butte, Montana

Attorneys for Defendants.

Service of the foregoing Answer is accepted by the undersigned and receipt of a copy thereof acknowledged this 23rd day of September, A. D., 1940.

W. D. MURRAY

Assistant U. S. Attorney and

Attorney for the Plaintiff.

[40]

EXHIBIT "1"

Cut Bank, Montana

December 4, 1936.

To the Secretary of Interior, U.S.A.,  
Washington, D. C.

Att. Mr. T. A. Walters, First Assistant  
Secretary of Interior

Dear Sir:

Regarding: Oil and Gas Lease # 129 Cont-I-5-ind  
7023 of January 24, 1936

Above lease to R. E. Lee of Cut Bank, Montana,  
covering 470 acres located as follows:

E $\frac{1}{2}$  E $\frac{1}{2}$  E $\frac{1}{2}$  W $\frac{1}{2}$  NE $\frac{1}{4}$ , E $\frac{1}{2}$  SE $\frac{1}{4}$  Sec. 27,  
T. 33 N, R 6 W, SW $\frac{1}{4}$  W $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$ , SE

$\frac{1}{4}$  Sec. 26, T. 33 N, R 6 W,  $W\frac{1}{2}$   $W\frac{1}{2}$   $SW\frac{1}{4}$  Sec. 25, T. 33 N, R 6 W, all in Glacier County, Montana.

In June 1936 R. E. Lee completed one well as a dry hole, drilled into Madison Lime and abandoned in accordance with terms of lease. This well located in center of  $W\frac{1}{2}$   $NW\frac{1}{2}$   $SW\frac{1}{4}$  Sec. 25, T. 33 N, R 6 W.

R. E. Lee then participated in the drilling of a well on adjoining land to the above described lease. This well was located in center of  $SW\frac{1}{4}$   $NE\frac{1}{4}$  Sec. 26, T. 33 N, R. 6 W, and was a direct offset to above described lease and important in proving the further desirability in drilling above described lease. This well was completed as a dry hole in October 1936, drilled into Madison Lime and abandoned in accordance with regulations of Government leases.

Other developments on lands adjoining the above described lease such as a dry hole in Section 2, T. 32 N, R. 6 W, and a dry hole in  $SW\frac{1}{4}$  of  $SW\frac{1}{4}$  of Sec. 1, T. 32 N, R. 6 W, all point to the improbability of obtaining oil or gas production by further development or drilling on the above described lease.

R. E. Lee, therefore, requests cancellation of this lease, cancellation or release of bond, and release from all liability under bond, and requests this consideration on account of:

1. Having in good faith and strictly under terms of the lease completed part of the development required which proved unsuccessful.

2. And other developments on adjoining lands being unsuccessful and discouraging further development expense on this lease.

Yours very truly,  
sgd. R. E. LEE [41]

---

EXHIBIT 2

United States  
Department of the Interior  
Office of Indian Affairs  
Washington

Feb. 3, 1938

L-O&G

52143-37

Ira L. Quiat, Esq.,  
Suite 415, Symes Building,  
Denver, Colorado.

My dear Mr. Quiat:

Under date of August 12, 1937 you filed a statement by Mr. R. E. Lee in answer to notice to show cause why an oil and gas mining lease, No. 129, on Blackfeet tribal Indian lands in Montana, should not be canceled and he held liable for the payment of \$6,000, the penalty of the bond, for failure to comply with its drilling requirements.



The matter was referred to the Blackfeet Tribal Council and the action of the Council was opposed to accepting surrender of the lease and relieving the lessee from the payment of the above mentioned sum. The Department has carefully considered the matter and feels that the wishes of the Indians are reasonable and should be followed. The lease was accordingly canceled January 20 and Mr. Lee and his surety were held liable for the payment of the full amount of the bond and for the proper conditioning of the leased premises. As attorney for the lessee, you are accordingly notified that he will be allowed 30 days from date of this letter within which to pay \$6,000 to the Superintendent of the Blackfeet Indian Agency, Browning, Montana, and properly to condition the leased premises, or show cause why suit should not be brought to collect the said amount and for any additional sum that may be determined properly to be due the Indians for failure properly to plug and abandon the wells on the leased premises or otherwise properly condition the premises.

A copy of this letter is being sent to the Standard Accident Insurance Company, surety on Mr. Lee's bond, for its information and as notice in the premises and for such action as it may care to take in the matter.

Sincerely yours,

WILLIAM ZIMMERMAN, JR.,  
Assistant Commissioner.

[Endorsed]: Filed Sept. 23, 1940. [42]



[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF  
THE PLEADINGS

Comes now the plaintiff, the United States of America, and moves that judgment be entered for plaintiff on the pleadings. In support of this motion plaintiff alleges:

I.

That this Court by denying defendants' motions to dismiss dated the 12th day of January, 1940, has already ruled that plaintiff's complaint states a cause of action upon which relief may be granted;

II.

That defendants' answer makes but three defenses, all of which must fail as follows:

1. Defendants' first defense that "The complaint fails to state a claim against defendants, or either of them, upon which relief can be granted" is obviously without merit and need not be examined for the reason that as stated above this Court has already ruled against defendants on this defense in denying their motions to dismiss. [46]

2. Defendants' second defense, which consists of denials of certain statements made in plaintiff's complaint, must fail for the reason that it admits all of the ultimate facts alleged in the complaint necessary to the statement of plaintiff's cause of action. (See accompanying memorandum of points and authorities).

3. Defendants' third or affirmative defense that defendants terminated their obligation under the lease by surrender and that in view of the dry wells drilled in the vicinity the refusal of the Secretary of the Interior to accept the surrender was arbitrary and void and his demand for the payment of the bond was an attempt to enforce a penalty must fail for the reason that defendants have been unable to allege any fact to alter the express requirement of the lease that a surrender thereof must be with the consent of the Secretary of the Interior; that the requirement of consent implies the full and unqualified power to refuse the consent; that the drilling of wells by other persons upon land adjacent to the leased premises is not a valid substitute for the drilling requirements of the lease and until defendants have tested the leased premises as required by the lease itself, namely, one well for every forty acre tract, defendants have no basis for the assertion that the Secretary of the Interior has acted arbitrarily in refusing to accept a surrender of the lease; that the provision in the lease that defendants will pay the full amount of the bond should the lessee fail or refuse to drill as provided in paragraph 4 thereof is not a penalty but a valid provision for liquidated damages and is enforceable to the full amount without allegation or proof of damage. (See accompanying memorandum of points and authorities). [47]

Wherefore plaintiff prays judgment against the defendants and each of them in the sum of \$6,000.00,

the amount of the bond, together with interest thereon at the rate of 6% per annum from the date of the demand made for payment thereof, namely, the 3rd day of February, 1938.

R. LEWIS BROWN

Ass't. U. S. Attorney.

Service of the foregoing and receipt of a true and correct copy is hereby acknowledged this 27th day of December, 1940.

CORETTE AND CORETTE

By ROBERT CORETTE

Attorneys for the Defendants.

[Endorsed]: Filed Dec. 28, 1940. [48]

---

[Title of District Court and Cause.]

DEFENDANTS' CROSS MOTION FOR JUDGMENT ON THE PLEADINGS

Come Now the Defendants, R. E. Lee and Standard Accident Insurance Company, a corporation, and move the Court for a judgment on the pleadings, as prayed for in Defendants' Answer, in favor of the Defendants and against the Plaintiff, upon the ground and for the reason that the Plaintiff, by filing a motion for judgment on the pleadings, has admitted the affirmative allegations of Defendants' Answer and the pleadings in the case now raise no material issue of fact, but only questions of law, and under said pleadings the Defendants are entitled to the judgment prayed for as against the Plaintiff.

This Motion of Defendants for judgment on the pleadings should be granted because it is now admitted that the Secretary of the Interior, in refusing to consent to the surrender by the Defendant, R. E. Lee, of the oil and gas lease involved in the above entitled action, acted arbitrarily, unreasonably and without any facts upon which to base his action, and that his refusal to consent to the surrender of the oil and gas lease involved was an abuse of discretion and was contrary to law. [50]

This Motion is based upon the pleadings and upon the records and files in the above entitled action.

Dated this 1st day of April, A. D., 1941.

CORETTE & CORETTE

By J. E. CORETTE, JR.

CORETTE & CORETTE

619 Hennessy Building

Butte, Montana

Attorneys for Defendants.

Service of the foregoing Defendants' Cross Motion for Judgment on the Pleadings admitted, and copy thereof received this 3rd day of April, 1941.

JOHN B. TANSIL

U. S. Atty.

R. LEWIS BROWN

Asst. U. S. Atty.

Attorneys for Plaintiff,

United States of  
America.

[Endorsed]: Filed Apr. 3, 1941. [51]

[Title of District Court and Cause.]

ORDER DENYING MOTIONS FOR  
JUDGMENT ON THE PLEADINGS

The questions presented at this time in the above entitled cause arise over motions made by the respective parties for Judgment on the pleadings based upon the reasons therein set forth.

Exhaustive briefs were filed and the material questions ably discussed by both sides. Most of the problems are not new, and have come before this court on other occasions, as counsel for the plaintiff has indicated.

The court is satisfied that the motions of defendants for judgment on the pleadings should be denied, and such is the court's order. The only remaining question to be determined is whether there is here presented by the answer a substantial admission of the material allegations of the complaint. Counsel has analyzed the allegations of the complaint and exhibit, which is a part of the complaint, and the answer, and made a forcible argument in favor of his motion, which the court has considered in connection with the arguments of opposing counsel, together with the numerous authorities cited, many of which the court has heretofore had occasion to consult in like or similar cases. If defendants could be held to have admitted substantially the material allegations of the complaint, then there would appear to be no other alternative than to grant the plaintiff's motion for judgment.

The court has endeavored carefully to analyze the several paragraphs of the complaint and answer and is unable to agree with counsel that there exists a substantial admission of every material allegation of the complaint, consequently the court is of the opinion that plaintiff's motion should also be denied, and it is so ordered.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed Aug. 27, 1941. [58]

---

[Title of District Court and Cause.]

#### MOTION TO AMEND ANSWER

Come Now the Defendants in the above entitled case and request leave of the above entitled Court in the above entitled cause for permission to amend the Answer on file in the above entitled cause in the following particulars:

##### I.

By adding between Paragraph 8 and Paragraph 9 of the Third Defense to said Answer the following paragraphs:

"8-a. That Paragraph 8 of the Oil & Gas Lease, which is Exhibit A to Plaintiff's Complaint and which is hereby referred to and incorporated by reference as a part of this Answer, provides as follows:



‘8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided. That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties.’

That the regulations governing the leasing of tribal lands for mining purposes, in effect at the time that the said Oil & Gas Lease became effective, were approved by the Secretary of Interior on July 23, 1924, and contained Paragraph 27, relating to cancellation of leases, which paragraph read as follows: [64]

‘27. A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and



recorded release of record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay advance royalties and rentals in lieu of development annually when due by reason of any subsequent surrender or cancellation of the lease. Upon cancellation of a lease the lessor shall be entitled to take immediate possession of the land.'

8-b. That R. E. Lee, in applying to the Secretary of Interior for consent to the surrender of the said Oil & Gas Lease, which is Exhibit A to Plaintiff's complaint, as set forth in Exhibit 1 to this Answer, complied with each and all of the requirements of Paragraph 27 of said Rules and Regulations and presented to the Secretary of the Interior good cause of why the said Oil & Gas Lease should be cancelled.

8-c. After receiving the letter, dated July 9th, 1937, from William Zimmerman, Assistant Commissioner, which is Exhibit C to Plaintiff's Complaint in the above entitled action and which is hereby referred to and incorporated as a part of this Answer, the said R. E. Lee filed, within the time allowed, with the Secretary of the Interior a statement showing cause why the said Oil & Gas Lease should not be cancelled and why his application for con-

sent to the surrender of said Oil & Gas Lease should be approved. The said statement filed with the Secretary of the Interior by the said R. E. Lee in answer to the said letter of July 9th, 1937, is attached hereto, marked Exhibit 3, hereby referred to and incorporated as a part of this Answer."

This request for leave of court to amend the Answer, as hereinbefore set forth, is made for the reason that the Defendants in the above entitled case are not absolutely certain that evidence of the matters referred to in these amendments would be admissible under the allegations of the Answer, [65] although they believe that even a strict construction of the allegations of the answer would allow the introduction in evidence of all of the matters and things alleged in the foregoing amendments.

This request is made for the further reason that the Defendants believe that the case cannot be fully and adequately presented to the Court or considered by the Court without presenting and giving consideration to the rules and regulations of the Secretary of the Interior, which are a part of the Oil & Gas Lease, as provided in Paragraph 8 of that Oil & Gas Lease, and for the further reason that this case cannot be adequately presented or considered without the Court having before it the statement made by the said R. E. Lee to the Secretary of the Interior in answer to the said letter, dated July 9th, 1937, advising R. E. Lee that he should show cause why the Lease should not be cancelled.

This request is based on the allegations contained herein and on all of the papers on file in the above entitled action.

Respectfully submitted,

CORETTE & CORETTE

By J. E. CORETTE

Attorneys for Defendants. [66]

---

EXHIBIT 3

Hon. Harold L. Ickes  
Secretary of the Interior,  
Washington, D. C.

Dear Sir:

Blackfeet Tribal Lease No. 129 and Allotted No. 137

On September 25, 1935, at a Public Auction held at the Blackfeet Agency, Browning, Montana, Mr. Geo. H. Campbell was the successful bidder on Tract 1 consisting of the  $E\frac{1}{2}E\frac{1}{2}E\frac{1}{2}W\frac{1}{2}NE\frac{1}{4}$  Sec. 27,  $E\frac{1}{2}SE\frac{1}{4}$  Sec. 27,  $SW\frac{1}{4}$  Sec. 26, T 33 N, R 6 W, containing 250 acres and Tract 2 consisting of the  $W\frac{1}{2}NW\frac{1}{4}NE\frac{1}{4}$ ,  $SE\frac{1}{4}$  Sec. 26,  $W\frac{1}{2}W\frac{1}{2}SW\frac{1}{4}$  Sec. 25, T 33 N, R 6 W, containing 220 acres.

Mr. R. E. Lee negotiated with Mr. Campbell for the two tracts before the lease was drawn and the lease was then drawn as one lease in the name of R. E. Lee.

A Bond for the sum of \$6,000.00 was obtained by Mr. Lee from the Standard Accident Insurance

Co. with Fred Goodstein and the American Iron and Metal Company of Denver, Colorado, as indemnitors.

On December 9, 1935, the executed Lease and Bond together with a cashier's check for \$740.00 to cover the remainder due on the bonus and the advance annual rental were delivered to Mr. O'Hara, Supt. of the Blackfeet Agency.

Mr. Lee was advised by letter on February 4, 1936, that his lease had been approved as Tribal Lease No. 129 by the Secretary of the Interior as of January 24, 1936.

Prior to the approval of the lease by the Secretary, Mr. Lee had successfully negotiated with Mr. Fred Goodstein and the American Iron and Metal Company of Denver, Colorado, for the full development of the lease according to the terms of the lease.

Unusually bad weather prevented Mr. Goodstein and the American Iron and Metal Company from beginning immediate development work but as soon as it was possible a well was begun in the center of the  $W\frac{1}{2}NW\frac{1}{4}SW\frac{1}{4}$  Sec. 25, T 33 N, R 6 W. This location was chosen as being the highest structural position on the lease. [67]

The well was spudded on March 25, 1936, and diligently drilled in a good workmanlike manner into the upper Cut Bank sand. The upper Cut Bank sand was found at 2900 feet and was 80 feet thick. It was very hard with practically no porosity. Only a slight show of oil was found at 2970 feet.

The lower Cut Bank sand, which is the main producing horizon in the Cut Bank field, was not present.

Every effort was made to make a commercial well of the small showing found at 2970 feet by shooting, but they were unsuccessful.

As soon as it was realized that a commercial well could not be obtained from the small showing in the upper Cut Bank sand, the well was deepened through the very cavey Ellis shale to the top of the Madison lime at 3140 feet where sulphur water was encountered. The well was drilled 100 feet into the Madison limestone as required by the provisions of the lease at great expense because of the water and cavey nature of the Ellis shale.

The well was then plugged and abandoned according to the regulations and under the supervision of the United States Geological Survey.

A very difficult and expensive fishing job during the deepening of the well from the upper Cut Bank sand into the Madison limestone resulted in a cost of approximately \$25,000 for the drilling and abandoning of the well.

Prior to the drilling of the R. E. Lee Tribal 129 No. 1, twelve wells had been drilled to the Madison limestone in the Cut Bank field, none of them found oil and all of them found sulphur water.

Approximately \$8,000.00 of the total cost of the well was spent to comply with the terms of the lease after it was known that a commercial well could not be obtained.

Under ordinary field practice a non-commercial well can be abandoned for approximately \$500.00.

During the drilling of the R. E. Lee Tribal 129 No. 1 well, Mr. Lee and associates had obtained at a public sale at Browning, [68] Montana, Allotted Lease No. 137 immediately adjacent to Tribal 129 on the North and to obtain more geological data regarding Lease No. 129, Mr. Fred Goodstein and the American Iron and Metal Company participated in the drilling of a well offsetting Lease No. 129 as shown on the enclosed plat.

The R. E. Lee Allotted 137 Well No. 1 was drilled 100 feet into the Madison Lime without finding the Cut Bank sand present and finding sulphur water in the Madison Limestone. The cost of this well was approximately the same as for the well on Tribal No. 129.

This well was plugged and abandoned according to the regulation and under the direction of the United States Geological Survey.

Subsequent to the drilling of the two R. E. Lee wells, there has been three other wells completed to the South and South and East of the R. E. Lee Tribal No. 129 which have been dry and abandoned, all of them finding the Cut Bank sand very poorly developed or entirely absent.

These wells have been drilled over a structural range covering the entire Lee Leases.

It is the opinion of geologists who are familiar with the entire development of the Cut Bank field



that there is practically no chance for commercial production on either of the Lee Leases.

Prior to negotiations for Tribal Lease No. 129, Mr. Lee discussed the operating regulations and nature of the Bond required with members of the United States Geological Survey.

He was informed that the Bond required was for the protection of the lease to see that proper drilling, casing and abandonment procedure were followed. He was also informed that should a dry hole be completed on one of the leases and he did not feel justified in further development that he could ask for cancellation of his lease without penalty to himself.

Quoting from the Notice of Sale of Oil and Gas Leases dated at Browning, Montana, August 30, 1935, which advertised Tract 1 and 2 of which Tribal Lease No. 129 is composed: "The lessee will not be required to furnish any special bond but the usual bond prescribed by the regulations of the Secretary of the Interior must be filed." [69]

Quoting from the Oil and Gas Mining Lease issued to R. E. Lee on Tribal No. 129—Sec. 7: "The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of One Dollar and have this lease cancelled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder, pro-



vided, that if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.”

The Lessee, R. E. Lee, through Fred Goodstein and the American Iron and Metal Company, completed a dry hole that was carried to the depth prescribed in the terms of the lease, and was abandoned under the supervision of the U. S. Geological Survey.

The lessee participated in the drilling of a well the prescribed depth into the Madison limestone which disproved production on Allotted Lease No. 137 and also further disproved commercial production on Tribal Lease No. 129.

The lessee and his associates, Mr. Fred Goodstein and the American Iron and Metal Company, did not think there was sufficient chance to find commercial production on either lease to warrant the expenditure of additional money and asked to be released from further obligation without penalty on December 4, 1936.

Should the Commissioner of Indian Affairs continue to ask for payment on the Bond after a dry hole has been drilled on the lease for failure to drill other dry holes, it will have a very detrimental effect on future sales of Indian lands in the Cut Bank field. No prudent operator would obligate himself to drill where there is no release except by forfeiture of his Bond should his first venture be unsuccessful.

In view of the above facts, we feel that we are entitled to have this lease cancelled without penalty.

Yours very truly,

R. E. LEE.

[Endorsed]: Filed Nov. 25, 1941. [70]

---

[Title of District Court and Cause.]

### RECORD OF TRIAL

This cause came on regularly for trial this day, Mr. R. Lewis Brown and Mr. W. D. Murray, Assistants to the District Attorney, being present and appearing for the United States, Mr. J. E. Corette, Jr., Mr. Allen Kendrick Smith and Sam B. Chase, Jr., appearing for the defendants. Mrs. Mary E. Pearson acted as court reporter.

Thereupon in view of an understanding between counsel for the parties, expressed in open court, as to certain proof in the case, the defendants withdrew their motion heretofore filed herein for leave to amend their answer.

Thereupon it was agreed by all parties that a trial by jury be waived and that the case be tried to the court without a jury.

Thereupon counsel for the defendants admitted that a demand was made upon the defendants for the payment of the sum of \$6000.00 as alleged in the plaintiff's complaint herein.

Thereupon a certain letter marked as Plaintiff's Exhibit No. 1, was offered by the plaintiff and received in evidence, whereupon the plaintiff rested.

Thereupon defendants offered certain documents which were marked as defendants' exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, which were received in evidence. Thereupon certain facts were agreed to by counsel for the respective parties.

Thereupon Robert E. Lee and J. E. Hupp were sworn and examined as witnesses for the defendants, and three maps marked as defendants' exhibits Nos. 12, 13 and 14, were offered and received in evidence, whereupon the defendants rested. Thereupon the plaintiff rested and the evidence closed.

Thereupon the defendants, and each of them, at the close of all of the evidence, moved the court for a dismissal of the case and for judgment in favor of the defendants and against the plaintiff, on grounds stated to the court. Thereupon the plaintiff renewed its motion for judgment as prayed for in its complaint, and said motions were taken under advisement by the court.

Thereupon court ordered that the plaintiff be granted thirty days after receipt of the transcript of the evidence, within which to serve and file its brief herein; that the defendants be granted thirty days thereafter within which to serve and file their brief, and that the plaintiff be granted thirty days from that time within which to file a reply brief if

so desired; whereupon the cause will be considered as submitted to the court and taken under advisement.

Court further ordered that the court reporter, Mrs. Mary E. Pearson, be permitted to withdraw the exhibits in the case, for her use in preparing transcript of the evidence.

Entered in open court at Great Falls, Montana,  
Dec. 1, 1941.

C. R. GARLOW,  
Clerk. [75]

---

[Title of District Court and Cause.]

## PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court, the Honorable Charles N. Pray, Judge presiding, without a jury at Great Falls, Montana, on December 1, 1941, plaintiff being represented by R. Lewis Brown and W. D. Murray, Assistant Attorneys of the United States, in and for the District of Montana, the defendant R. E. Lee being present in court and represented by his attorneys, Messrs. Corette & Corette and Kendrick Smith, Esq., and the defendant Standard Accident Insurance Company, a corporation, being represented by its attorneys, Messrs. Corette & Corette and Kendrick Smith, Esq.; thereupon oral and documentary evi-

dence was introduced and at the close of all the evidence the parties asked for and were by the Court granted time within which to prepare, serve and lodge with the Clerk their written briefs and proposed findings of fact and conclusions of law; that thereafter briefs on behalf of each of the parties hereto and proposed findings of fact and conclusions of law were so prepared, served and lodged with the Clerk, and thereupon the cause was taken under advisement by the Court for consideration and decision, and the Court having considered all of the evidence introduced at the trial of the case and admissions and stipulations of counsel made during the trial and the briefs filed on behalf of the parties hereto, [77] and being fully advised in the premises, makes these its findings of fact and conclusions of law as follows:

## FINDINGS OF FACT

### I.

That at all of the times mentioned herein, the Plaintiff was, is and continues to be the owner in fee simple of the

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4, Section 27, T. 33, N., R. 6 W., M. P. M.

SW/4, W/2 NW/4 NE/4, SE/4, Section 26, T. 33, N., R. 6 W., M. P. M.;

W/2 W/2 SW/4, Section 25, T. 33, N., R. 6 W., M. P. M. containing 470 acres.

located upon and within the Blackfeet Indian Reservation, Glacier County, State and District of

Montana, together with all the oils and minerals contained beneath the surface of the said property, and the same and the whole thereof being held by the United States in trust for the use and benefit of the Blackfeet tribe of Indians, residing on said Indian Reservation and its individual wards residing thereon.

## II.

That the defendant Standard Accident Insurance Company, a corporation, was, continued to be and now is a corporation duly and regularly organized and existing, and as such authorized to be, act and become a surety.

## III.

That on or about the 26th day of September, 1935, the plaintiff, acting by and through the Superintendent and special disbursing agent of the said Blackfeet tribe of Indians and for the use and benefit of the said tribe and the Indian wards residing on the said Reservation, entered into the lease in writing which is attached to the plaintiff's complaint as Exhibit "A" and which said lease was duly and regularly approved by the said Secretary of the Interior on the 24th day of January, 1936. [78]

## IV.

That in order that the said lease become effective, said R. E. Lee, as principal, and the said Standard Accident Insurance Company, a corporation, as



surety, duly and regularly made, executed and delivered to the plaintiff on the 10th day of December, 1935, their certain bond and undertaking which is attached to the plaintiff's complaint as Exhibit "B", and which said bond and undertaking was approved on the 24th day of January, 1936, duly and regularly by the Secretary of the Interior, and thereupon said lease came into effect.

## V.

That the said lease provided among other things as follows:

"(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days from date of the approval hereof by the Secretary of the Interior, and to drill at least (four) wells on the premises within one year from the date of such approval \* \* \*. If the lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation."

## VI.

That upon the said lease becoming in full force and effect, the defendant R. E. Lee entered into

and upon the leased premises and took possession thereof and commenced drilling operations thereon, but that notwithstanding the provisions in said lease said R. E. Lee did not drill four wells upon the said leased premises within one year from the date of the approval of the lease as he had promised and agreed to do, or at all, but drilled only one well on the said leased premises during the said time and wrongfully failed, refused and neglected to drill [79] the said four wells within the said time, or any more than one well within the said time.

#### VII.

That the said R. E. Lee, in failing and refusing to drill four wells upon the said leased premises within one year from the time the said lease became effective as he promised and agreed to do, breached the said lease in that regard and wrongfully failed to perform the same, and because of the said breach of the provision of said lease by the said R. E. Lee, the Secretary of the Interior, on the 20th day of January, 1938, duly and regularly cancelled the said lease.

#### VIII.

That on the 3rd day of February, 1938, a demand was made upon the defendants for the payment of the sum of \$6000.00, the amount agreed to be paid by them upon the breach of the terms of the said lease by the defendant R. E. Lee, but the said defendants and each of them failed, refused and

neglected to pay the said sum of \$6,000.00, or any part or portion thereof, and continued to fail, refuse and neglect to pay the said sum of \$6,000.00, or any part or portion thereof.

## IX.

That except as the same may be contrary to any express finding of fact herein made, the Court finds generally all of the facts in issue in favor of the plaintiff and against the defendants and finds generally that plaintiff has sustained by competent proof all of the material allegations of its complaint.

From the foregoing facts, the Court draws the following:

## CONCLUSIONS OF LAW

### I.

That this Court has jurisdiction hereof.

### II.

That because of the failure of the defendant R. E. Lee to perform the obligations on him to be performed under said [80] lease and to drill four wells within one year from the effective date thereof, said R. E. Lee breached the said lease, and the Secretary of the Interior, in all respects, acted lawfully in cancelling and terminating the same, and that upon such termination and cancellation by the Secretary of the Interior the defendants and each of them became liable to the plaintiff as provided

in said lease and the said bond executed in pursuance thereof.

### III.

That the plaintiff is entitled to a judgment in its favor and against the defendants and each of them for the sum of \$6,000.00, together with interest thereon at 6% per annum from the 3rd day of February, 1938, and the plaintiff's costs herein necessarily expended.

Done and dated June 27th, 1942.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed June 27, 1942. [81]

---

[Title of District Court and Cause.]

### DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the Defendants, R. E. Lee and Standard Accident Insurance Company, a corporation, and present Defendants' Proposed Findings of Fact and Conclusions of Law attached hereto, and petition the Court to adopt the same.

CORETTE & CORETTE  
By KENDRICK SMITH  
619 Hennessy Building  
Butte, Montana,  
Attorneys for Defendants

Service of the Defendants' Proposed Findings of Fact and Conclusions of Law hereto attached acknowledged and a copy thereof received this 30th day of April, 1942.

R. LEWIS BROWN

W. D. MURRAY

Assistant Attorneys of the  
United States in and for the  
District of Montana.

[Endorsed]: Filed May 1, 1942. [83]

---

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

This cause came on regularly for trial before the Court, the Honorable Charles N. Pray, Judge presiding, without a jury, at Great Falls, Montana, on December 1, 1941, Plaintiff being represented by R. Lewis Brown and W. D. Murray, Assistant Attorneys for the United States in and for the District of Montana, the Defendants, R. E. Lee and Standard Accident Insurance Company, a corporation, being represented by their attorneys Messrs. Corette & Corette. Thereupon oral and documentary evidence was introduced and at the close of all the evidence the parties asked for and were by the Court granted time within which to prepare, serve and lodge with the Court their written briefs and proposed findings

of fact and conclusions of law. Thereafter briefs on behalf of each of the parties hereto and proposed findings of fact and conclusions of law were so prepared, served and lodged with the Court, and thereupon the cause was taken under advisement by the Court for consideration and decision, and the Court having considered all of the evidence at the trial of the case and admissions and stipulations of [84] counsel made during the trial and briefs filed on behalf of the parties hereto, and being fully advised in the premises, makes these its findings of fact and conclusions of law as follows:

## FINDINGS OF FACT

### I.

That at all of the times mentioned herein, the Plaintiff was, is and continues to be the owner in fee simple of the

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4, Section 27, T. 33, N., R. 6 W., M. P. M.

SW/4, W/2 NW/4 NE/4, SE/4, Section 26, T. 33, N., R. 6 W., M. P. M.;

W/2 W/2 SW/4, Section 25, T. 33, N., R. 6 W., M. P. M. containing 470 acres

located upon and within the Blackfeet Indian Reservation, Glacier County, State and District of Montana, together with all the oils and minerals contained beneath the surface of the said property, and the same and the whole thereof being held by the United States in trust for the use and benefit of the



Blackfeet tribe of Indians, residing on said Indian Reservation and its individual wards residing thereon.

## II.

That the defendant Standard Accident Insurance Company, a corporation, was, continued to be and now is a corporation duly and regularly organized and existing, and as such authorized to be, act and become a surety.

## III.

That on or about the 26th day of September, 1935, the plaintiff, acting by and through the Superintendent of the said Blackfeet tribe of Indians, entered into the lease in writing which is attached to the plaintiff's complaint as Exhibit "A" and which said lease was duly and regularly approved by the said Secretary of the Interior on the 24th day of January, 1936.

## IV.

That in order that the said lease become effective, said [85] R. E. Lee, as principal, and the said Standard Accident Insurance Company, a corporation, as surety, duly and regularly made, executed and delivered to the plaintiff on the 10th day of December, 1935, their certain bond and undertaking which is attached to the plaintiff's complaint as Exhibit "B", and which said bond and undertaking was approved on the 24th day of January, 1936, duly and regularly by the Secretary of the Interior, and thereupon said lease came into effect.

## V.

That the said lease provided among other things as follows:

“(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days from date of the approval hereof by the Secretary of the Interior, and to drill at least (Four) wells on the premises within one year from the date of such approval \* \* \*. If the lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation.”

“(7) The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease canceled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder: Provided, That if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.

“(8) This lease shall be subject to the regulations of the Secretary of the Interior now or

hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties."

That the regulations of the Secretary of the Interior [86] governing the leasing of tribal lands for mining purposes approved by Hubert Work, Secretary of the Interior on July 23, 1924, and in force and effect during all of the times herein involved provided in article 27 thereof as follows:

"27. A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and recorded release of record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay

advance royalties and rentals in lieu of development annually when due by reason of any subsequent surrender or cancellation of the lease. Upon Cancellation of a lease the lessor shall be entitled to take immediate possession of the land."

## VI.

That the Defendant R. E. Lee entered into and upon the leased premises, commenced drilling operations thereon and drilled one well at a cost of approximately \$25,000, of which sum \$8,000 was expended to comply with the terms of the lease after it was known that a commercial well could not be obtained. That said well was a dry well and was completed and abandoned within one year after the date of the approval of said lease and bond.

## VII.

That upon the completion of the drilling of the said well upon the said leased premises within one year from the time the said lease became effective, the said R. E. Lee made applications to the Secretary of the Interior for cancellation and surrender of the said lease in accordance with and complying with the provisions of paragraphs 7 and 8 of said lease and article 27 of the aforesaid Regulations of the Secretary of the Interior. [87] That said applications for cancellation and surrender were properly made and all of the terms and conditions therefor were complied with by the said R. E. Lee. That the said applications of the said R. E. Lee for cancella-

tion and surrender constituted a showing of good cause for said requested cancellation and surrender by a showing which the court finds to be true as follows:

(a) That the said well drilled upon said leased premises was a dry well.

(b) That a similar well drilled by the said R. E. Lee upon an immediately adjacent tract of land was a dry well.

(c) That three other wells drilled in the immediate vicinity were dry.

(d) That the aforesaid five wells were drilled over a structural range covering the entire premises of the said leased premises.

(e) That geologically there was no chance of securing oil or gas by drilling upon the said leased premises.

(f) That the local field officers of the Geological Survey were of the opinion and so reported to the Secretary of the Interior that the lands had been "adequately tested".

(g) That the Supervisor of the Geological Survey reported officially to the Secretary of the Interior, through a letter addressed to the Superintendent of the Blackfeet Indian Agency, as follows:

"\* \* I cannot justify any requirement for the additional three wells in view of the dry hole drilled on the lease, and the dry hole drilled in the SW NE Section 26, T. 33 N., R. 6 W.

“It is therefore recommended that the request for cancellation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe.”

[88]

### VIII.

That the Secretary of the Interior refused the said applications for cancellation and surrender and made demand upon the Defendants for the payment of the said bond. That said demand for said payment of the bond was wrongful and unlawful.

### IX.

That in refusing and rejecting the said applications for cancellation and surrender the Secretary of the Interior did not have any fact or circumstance upon which to base or to justify the said refusal and rejection.

### X.

That the Secretary of the Interior acted arbitrarily and unreasonably in rejecting and refusing the said application for cancellation and surrender.

### XI.

That in refusing and rejecting the said application for surrender the Secretary of the Interior violated the terms of paragraph 7 of said lease in that his consent to a surrender thereunder could not be arbitrarily and unreasonably withheld.

### XII.

That in refusing and rejecting the applications for cancellation and surrender the Secretary of the



Interior violated the terms of paragraph 8 of said lease and of article 27 of the said Regulations in that good cause was shown for said application for cancellation.

### XIII.

That a payment of the amount of said bond by the Defendants would constitute a bonus or gratuity to the Plaintiff and that no damage of any kind or character has been suffered by Plaintiff. [89]

### XIV.

That except as the same may be contrary to any express finding of fact herein made, the Court finds generally all of the facts in issue under the Third Defense, as amended, of said Defendants in favor of the said Defendants and against the Plaintiff, and finds generally that Defendants have sustained, by competent proof, all of the material allegations of their said Third Defense, as amended.

From the foregoing facts the Court draws the following conclusions:

## CONCLUSIONS OF LAW

### I.

That this Court has jurisdiction hereof.

### II.

That the Secretary of the Interior had no power or authority to refuse and reject the said applications for cancellation and surrender and that the said Secretary of the Interior acted contrary to law

in refusing the said applications for cancellation and surrender of said lease.

### III.

That the purported termination and cancellation by the Secretary of the Interior of said lease and the demand for payment of the said bond was without force and effect.

### IV.

That Plaintiff is not entitled to a judgment in its favor and that Plaintiff's Complaint should be dismissed against the said Defendants.

### V.

That Defendants are relieved of all obligations and liabilities under the said lease and the said bond.

Done and dated ....., 1942.

.....  
Judge. [90]

---

[Title of District Court and Cause.]

### OPINION OF THE COURT

The above entitled cause was tried to the court without a jury, and is now submitted on briefs and proposed findings and conclusions for decision.

The court has endeavored carefully to consider the transcript, briefs and principal authorities re-

lied upon by counsel, in their respective motions for judgment on the pleadings as well as those submitted since the trial.

Plaintiff's counsel assumes that the court in the memorandum and order denying the motions of both parties for judgment on the pleadings indicated that if defendants could have been held to have admitted all the material allegations of the complaint that there would then have appeared to be no other alternative than to grant plaintiff's motion. And the court is still of the same opinion, notwithstanding able arguments to the contrary. Where the Secretary of the Interior enters into a lawful lease for the drilling of four wells on the lands leased within a year—that is to say, one well on each forty acres thereof, the weight of authority and the better reasoning would seem to indicate that on a failure of lessee to comply with his agreement he can not compel the Secretary to cancel the lease on a showing that he has drilled one well which was dry and that oil operators on adjacent territory have had no better success, and therefore he may decline to comply with his contract and drill three more wells because in his opinion there is no prospect of oil. It has been said that gold is where one finds it, and that saying would probably equally apply in case of oil and gas. It is common knowledge that the opinions of experts differ widely as to the probability or improbability of finding oil or gas underlying certain lands. [92]

The provisions of the lease and the regulations cited by counsel and the showing made would not control the secretary's judgment or require the court to override his decision in a purely administrative matter involving his discretion. It seems quite evident that in entering into the lease the test required by the Secretary as to the presence of oil or gas on the premises leased was the drilling of four wells within a year—one well on every forty acre tract. What the defendants in effect are contending for is, that in their case the Secretary will not be permitted to exercise his independent judgment but is compelled to cancel the lease because defendants assert that good cause has been established, and that he has been acting arbitrarily.

This court is of the opinion that the Secretary of the Interior had the authority to refuse cancellation of the lease under the contract and state of facts shown here. The test required by the Secretary and embodied in the contract as a substantial requirement of performance had not been made. Consequently the decision will have to be in favor of the plaintiff, as heretofore indicated, and appropriate findings and conclusions may be submitted.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Jun. 22, 1942. [93]

In the District Court of the United States  
District of Montana, Great Falls Division

No. 150

UNITED STATES OF AMERICA,

Plaintiff,

v.

R. E. LEE and STANDARD ACCIDENT INSUR-  
ANCE COMPANY, a Corporation,

Defendants.

### JUDGMENT

This case came on regularly before the Court, Honorable Charles N. Pray, Judge presiding without a Jury, at Great Falls, Montana, on the 1st day of December, 1941; the plaintiff was represented by R. Lewis Brown and W. D. Murray, Assistant Attorneys of the United States in and for the District of Montana, and the defendant, R. E. Lee, was present in Court and represented by his counsel, John E. Corette Jr., and Kendrick Smith, and the defendant, Standard Accident Insurance Company, a corporation, was represented by its counsel, John E. Corette Jr., and Kendrick Smith; thereupon, the parties announced themselves ready for trial and evidence was introduced by and on behalf of each of the parties to the action, and at the close of all of the evidence, each of the parties requested and were by the Court granted time

within which to prepare, serve and file written briefs; that thereafter, each of the parties hereto did prepare, serve and file their written briefs and arguments and the matter was then submitted to the Court for consideration and decision, and on the 22nd day of June, 1942, the Court, after considering all of the evidence and arguments of counsel and the law, and being fully advised in the premises, rendered its decision in favor of the plaintiff and against the defendants, and thereafter, made and filed its findings of fact and conclusions of law, which said findings of fact and conclusions of law so made by the Court and filed by the Clerk are hereby made a part hereof by reference as fully and completely as though they were set out in haec verba. [95]

Wherefore, by reason of the law and the premises, and the findings of fact and conclusions of law of the Court as aforesaid, It Is Ordered and Adjudged and This Does Order and Adjudge that the plaintiff above-named, United States of America, do have and recover of and from the defendants above-named, R. E. Lee and Standard Accident Insurance Company, a corporation, the sum of \$6,000.00, together with interest thereon at the rate of six (6%) per cent. per annum from the 3rd day of February, 1938, amounting to \$1,583.00, together with the plaintiff's costs and disbursements necessarily incurred herein and hereby taxed in the sum of \$109.19.



Done and Dated June 27th, 1942.

CHARLES N. PRAY

Judge

[Endorsed]: Ent. and filed, June 27, 1942. [96]

---

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS OF THE UNITED  
STATES FOR THE NINTH CIRCUIT

Notice Is Hereby Given that R. E. Lee and Standard Accident Insurance Company, a corporation, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 27th day of June, 1942, and from the whole thereof.

CORETTE & CORETTE

By KENDRICK SMITH

Attorneys for Appellants R.  
Lee and Standard Accident  
Insurance Company, a corporation.

Address: 619 Hennessy Bldg.  
Butte, Montana.

[Endorsed]: Filed Sept. 21, 1942. [98]

[Title of District Court and Cause.]

### PROCEEDINGS

Be It Remembered, that the above-entitled action came duly and regularly on for trial at Great Falls, Montana, at ten o'clock in the morning on Monday, December 1, 1941, before the Honorable Charles N. Pray, Judge, sitting without a jury. The plaintiff was represented by R. Lewis Brown and W. D. Murray, Assistant United States Attorneys, and the defendants were represented by John E. Corette, jr., and Kendrick Smith. Thereupon the following proceedings were had and taken and the following evidence, and none other, was introduced:

The Court: Gentlemen, in this case set for trial this morning, United States v. Lee, do you agree that it may be tried to the Court without a jury?

Mr. Brown: Yes, Your Honor.

Mr. Corette: That is agreeable to the defendant, Your Honor.

The Court: Very well. Mr. Brown, have you looked through the complaint and answer to see just what parts you deem will require some proof? They have admitted a great deal in the answer. I think there are some parts there you may have proof on.

Mr. Brown: I talked with Mr. Smith and Mr. Corette; they don't think there is any issue as far as the Government is concerned. In our complaint we have pleaded certain facts [106] and then

pleaded certain conclusions. They have admitted the facts, but they have denied the conclusions.

Mr. Corette: Perhaps the one point about which you may inquire—that is as to whether we were going to urge the point that in the answer we deny that a demand for \$6,000 was made on the surety company. In that connection the defendants will admit that a demand for \$6,000 was made upon one Ira L. Quiat, an attorney at law, representing R. E. Lee, by letter, and that a copy of that letter was sent to the surety company involved. As to the conclusions stated in the complaint which we have denied, we, of course, still deny those conclusions. I think the most important one is the denial of an obligation on our part to drill any further wells after having applied for surrender.

Mr. Brown: We offer in evidence Plaintiff's Exhibit No. 1, which is a letter written by Mr. William Zimmerman, jr., Commissioner, to Ira L. Quiat as attorney for Mr. Lee.

Mr. Corette: If the Court please, there is no objection to the admission of this exhibit provided it is understood that Ira L. Quiat represented Mr. Lee.

The Court: That is the reason, I suppose, the letter was sent.

Mr. Brown: This letter, Your Honor, is brief and it is addressed to

“Ira L. Quiat, Esq., Suite 415, Symes Building, Denver, Colorado. My dear Mr. Quiat:

Under date of August 12, 1937, you filed a statement by Mr. R. E. Lee in answer to notice to show cause why an oil and gas mining lease, No. 129, on Blackfeet tribal Indian lands in Montana, should not be canceled and be held liable for the payment of \$6,000, the penalty of the bond, for failure to comply with its drilling requirements. [107]

“The matter was referred to the Blackfeet Tribal Council and the action of the Council was opposed to accepting surrender of the lease and relieving the lessee from the payment of the above mentioned sum. The Department has carefully considered the matter and feels that the wishes of the Indians are reasonable and should be followed. The lease was accordingly canceled January 20 and Mr. Lee and his surety were held liable for the payment of the full amount of the bond and for the proper conditioning of the leased premises. As attorney for the lessee, you are accordingly notified that he will be allowed 30 days from date of this letter within which to pay \$6,000 to the Superintendent of the Blackfeet Indian Agency, Browning, Montana, and properly to condition the leased premises, or show cause why suit should not be brought to collect the said amount and for any additional sum that may be determined properly to be due the Indians for failure properly to plug and abandon the wells on the

leased premises or otherwise properly condition the premises.

“A copy of this letter is being sent to the Standard Accident Insurance Company, surety on Mr. Lee’s bond, for its information and as notice in the premises and for such action as it may care to take in the matter.

Sincerely yours,

WILLIAM ZIMMERMAN, JR.

Commissioner.

Copy to Standard Accident Insurance Co.,  
Detroit, Mich.

Copy, with copy of letter approved 1-20-38 to  
Supt., Blackfeet Agency.

1-cv-25

Copy to R. E. Lee, Cut Bank, Montana.

Carbon for Indian Office.” [108]

---

Mr. Brown: We rest, Your Honor.

Mr. Corette: If the Court please, perhaps we can save some time by putting in all the exhibits first and having them read.

The Court: Very well.

Mr. Corette: If the Court please, we now offer in evidence Defendant’s Exhibit No. 2, which is a letter dated December 4, 1936, from R. E. Lee to The Secretary of Interior, asking consent to surrender of the oil and gas lease involved. The exhibit was obtained from the United States Attorney.

Mr. Brown: We object to it, if the Court please, as hearsay, a self-serving declaration, incompetent, irrelevant, and immaterial for any purpose in this lawsuit.

The Court: It may be received subject to the objection.

Mr. Corette: As I understand it, there is no objection to the form—it is a certified copy?

Mr. Brown: No.

(Defendant's Exhibit No. 2, admitted in evidence and read to the Court by Mr. Corette, is in words and figures as follows:) [109]

“Received Dec. 18 1936 U. S. Geological Survey Casper, Wyoming.

“Received Dec. 21, 1936 Blackfeet Agency.

“Office of Indian Affairs received Mar 1 1937.  
———12831

“Cut Bank, Montana.  
December 4, 1936.

“To The Secretary of Interior, U. S. A.  
Washington, D. C.

Att: Mr. T. A. Walters, First Assistant  
Secretary of Interior

Dear Sir:

Regarding: Oil and Gas Lease #129  
Cont-I-5-ind 7023 of January 24, 1936.

Above lease to R. E. Lee of Cut Bank, Montana, covering 470 acres located as follows:



E $\frac{1}{2}$  E $\frac{1}{2}$  E $\frac{1}{2}$  W $\frac{1}{2}$  NE $\frac{1}{4}$ , E $\frac{1}{2}$  SE $\frac{1}{4}$  Sec. 27,  
T. 33N, R. 6W,  
SW $\frac{1}{4}$ , W $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  Sec. 26, T.  
33N., R. 6W,  
W $\frac{1}{2}$  W $\frac{1}{2}$  SW $\frac{1}{4}$  Sec. 25, T. 33N, R. 6W,  
all in Glacier County, Montana.

In June 1936 R. E. Lee completed one well as a dry hole, drilled into Madison Lime and abandoned in accordance with terms of lease. This well located in center of W $\frac{1}{2}$  NW $\frac{1}{4}$  SW $\frac{1}{4}$  Sec. 25, T. 33N, R. 6W.

R. E. Lee then participated in the drilling of a well on adjoining land to the above described lease. This well was located in center of SW $\frac{1}{4}$  NE $\frac{1}{4}$  Sec. 26, T. 33N, R. 6W, and was a direct offset to above described lease and important in proving the further desirability in drilling above described lease. This well was completed as a dry hole in October 1936, drilled into Madison Lime and abandoned in accordance with regulations of Government leases.

Other developments on lands adjoining the above described lease such as a dry hole in Section 2, T. 32N, R. 6W, and a dry hole in SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Sec. 1, T. 32N, R. 6W, all point to the improbability of obtaining oil or gas production by further development or drilling on the above described lease.

R. E. Lee, Therefore, requests cancellation of this lease, cancellation or release of bond,

and release from all liability under bond, and requests this consideration on account of: [110]

“1. Having in good faith and strictly under terms of the lease completed part of the development required which proved unsuccessful.

2. And other developments on adjoining lands being unsuccessful and discouraging further development expense on this lease.

Yours very truly,  
/s/ R. E. LEE”

---

Mr. Corette: We now offer Defendant's Exhibit No. 3 in evidence.

Mr. Brown: Objected to, if the Court please, as being incompetent, irrelevant, and immaterial, of no evidentiary value, and being simply the expression of an opinion of one in the Department of the Interior subordinate to the Secretary, in no manner controls the action of the Secretary.

The Court: It may be received subject to the objection. I don't know who this supervisor here is—what his duties were..

Mr. Corette: I thought we would prove that later on.

The Court: Very well.

Mr. Corette: Do I understand there is no objection to the form of these exhibits we are putting in, that they are photostatic copies, or certified copies?

Mr. Brown: That is the one that came to me from Washington, D. C. in response to the demand,

is the best we can get. I don't have any objection to its form.

Mr. Corette: We would like to say we appreciate the courtesies extended by the United States Attorney in furnishing whatever documents we have demanded from him, and to say that is the source of most of these documents. Has the Court read this exhibit?

The Court: Yes. It is received subject to objection.

(Defendant's Exhibit No. 3 received in evidence is in words and figures as follows:) [111]

DEFENDANT'S EXHIBIT No. 3

("Copy)

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
GEOLOGICAL SURVEY  
305 Federal Bldg.,  
Casper, Wyoming.

December 19, 1936.

Office of Indian Affairs received Jan 13 1937.

2417

"Mr. C. L. Graves, Superintendent,  
Blackfeet Indian Agency,  
Browning, Montana,  
Subject: Oil and Gas Lease No. 129.

Dear Sir:

"I am enclosing herewith three copies of an application prepared by R. E. Lee of Cut Bank,

Montana, requesting cancellation of oil and gas lease No. 129, contract 1-5-ind. 7023. This lease was approved January 24, 1936.

“One well has been drilled on the above lease in the SW Section 25, T. 33N., R. 6W., Cut Bank field, without finding any production above the Madison lime, or 100 feet into the Madison lime as required by the lease terms. The lease, under the Special terms approved by the Tribal Council, provides for the drilling of four wells on the premises within one year from the date of approval. I cannot justify any requirement for the additional three wells in view of the dry hole drilled on the lease, and the dry hole drilled in the SW NE Section 26, T. 33 N., R. 6 W.

“It is therefore recommended that the request for cancelation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe. Will you kindly advise this office the date of cancelation, in order to clear our records? Form 9-614 and a check for \$1.00 are attached hereto.

“Very truly yours,  
(Sgd) H. J. DUNCAN  
Supervisor.

“Enclosure  
cc Washington  
Shelby  
File

HJD VG

“Copy to Bureau of Indian Affairs.” [112]

Mr. Corette: Mr. Brown, may it be stipulated between counsel that Mr. H. J. Duncan, who wrote Defendant's Exhibit No. 3, is the Supervisor of the United States Geological Survey at the territorial or district office of that organization in Casper, Wyoming, and that office has charge of the territory including Glacier County and the land involved in this lawsuit.

Mr. Brown: It is so stipulated.

The Court: Very well.

Mr. Corette: Defendants now offer in evidence Defendant's Exhibits Nos. 4 and 5, which are the original receipts showing the payment in full of the bonus due at the time the lease involved was originally issued, and the advance royalty or annual rental due during the entire first year that the lease was in existence, that is the first year from the date of the approval of the lease by the Secretary of the Interior.

Mr. Brown: Objected to as entirely immaterial. There is no question under the pleadings that the defendant owed anything for royalty or rental. That is not in issue at all. I don't see the purpose of it.

Mr. Corette: I might say that the sole purpose is that as the defendant reads paragraph seven of the lease, they are entitled to ask the Secretary to cancel the lease only when the lease is in good standing, and at a time when they owe nothing under the lease.

Mr. Brown: We concede any payment of rental.

There is no delinquency in that respect. There is no issue on that at all.

The Court: Well, it may be received subject to the objection. [113]

(Defendant's Exhibit No. 4 received in evidence subject to objection, is in words and figures as follows, to-wit:)

### DEFENDANT'S EXHIBIT No. 4

"United States  
Department of the Interior  
Office of Indian Affairs  
5-652      O. R. No. 188188  
No. 188188

#### OFFICIAL RECEIPT

Received of Georg H. Campbell, c/o Mont. Power & Gas Co., Cut Bank, Montana, Sixty-five and no/100### Dollars.

Description of Exchange: Pd. by Cashier's Check #17018 dated 9/25/35, on the First Nat. Bank of Brown-ing, Montana.

(For Money Orders, Drafts, Checks, and other negotiable paper, give Description, Including Date, Number, Etc.)

Bill No.	For What	Quantity	Unit	Price	Amount	Funds to be Charged
Remit- tance, if not in cash, is accepted subject to collec- tion of exchange.	Payment of 20% of the Bonus bid on Tracts 1 and 2 as advertised for auction bid to be sold September 25, 1935. Deposited pending further developments. No Contract as yet.				65 00	Spec. Dep.

Total Carried,

65 00 lww



(Use Plain Letter-Size Paper for Extra Sheets, Citing  
Official Receipt Number on Each Sheet.)

Date—September 26, 1935.

Unit—Blackfeet Agency, Browning, Montana.

WARREN L. O'HARA

Special Disbursing Agent

By .....

Disbursing Officer.

/s/ J. H. BROTT

Deputy Disbursing Agent.

No. 188188

Original''

[114]

---

(Defendant's Exhibit No. 5 received in evidence subject to objection, is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 5

“United States  
Department of the Interior  
Office of Indian Affairs

5-652      O. R. No. 249705  
No. 249705

OFFICIAL RECEIPT

Received of R. E. Lee, Cut Bank, Montana, Seven Hundred Forty and no/100### Dollars.

Description of Exchange: Pd. by Cashier's Check No. 33, dated 12/2/35, on the Bank of Glacier County, Cut Bank, Mont.

(For Money Orders, Drafts, Checks, and other negotiable paper, give Description, Including Date, Number, Etc.)

Bill No.	For What	Quantity	Unit Price	Amount	Funds to be Charged
Remittance if not in cash, is accepted subject to collection of exchange.	Payment of the balance of the Bonus due on oil and gas lease numbered 129, the advance royalty or annual rental & the lease fee on same. No Contract on this lease pending approval.			740 00	Spec. Dep.

---

Total Carried, 740 00 lvw

(Use Plain Letter-Size Paper for Extra Sheets, Citing Official Receipt Number on Each Sheet.)

Date—December 9, 1935.

Unit—Blackfeet Agency, Browning, Montana.

WARREN L. O'HARA

Special Disbursing Agent

By .....

Disbursing Officer.

/s/ H. M. KNUTSON

Deputy Disbursing Officer.

No. 249705

Original''

[115]

---

Mr. Corette: Defendants now offer in evidence Defendant's Exhibit No. 6, which is the receipt for the \$1 surrender fee paid by R. E. Lee at the time he applied for the surrender.

Mr. Brown: Objected to as immaterial, without the issues.

The Court: It may be received subject to objection. [116]

(Defendant's Exhibit No. 6 received in evidence subject to objection, is in words and figures as follows, to-wit:)

## DEFENDANT'S EXHIBIT No. 6

“United States  
Department of the Interior  
Office of Indian Affairs

5-652      O. R. 340971  
No. 340970

## OFFICIAL RECEIPT

Received of R. E. Lee by the American Iron & Metal Co., Cut Bank, Montana, One and no/100### Dollars.

Description of Exchange: Pd. by Ck. #11494 dated 12/19/36, on the Casper Nat. Bank of Casper, Wyoming.

(For Money Orders, Drafts, Checks, and other negotiable paper, give Description, Including Date, Number, Etc.)

Bill No.	For What	Quantity	Unit	Price	Amount	Funds to be Charged
Remittance, if not in cash, is accepted subject to collec- tion of exchange.	Funds to cover the cancelation fee in the event cancela- tion is granted of oil and gas lease No. 129, approved by the Department under date of Jan- uary 24, 1936, and assigned contract number I-5-ind- 7023. Deposited pending final action of the Department on the application for cancellation.				1 00	Spec. Dep.

Total Carried,

1 00 29-lvw

(Use Plain Letter-Size Paper for Extra Sheets, Citing  
Official Receipt Number on Each Sheet.)

Date—January 18, 1937.

Unit—Blackfeet Agency, Montana.

/s/ H. M. KNUTSON

Deputy Disbursing Officer.

No. 340970

Original''

[117]

---

Mr. Corette: Perhaps the next point can be better covered by stipulation between counsel than by introduction of this voluminous document. I have in my hand a certified copy of the regulations governing the leasing of Tribal lands for mining purposes, approved by Hubert Work, Secretary of the Interior, on July 23, 1924. I would like to have in the record and to have the Court take judicial notice of Article 27 of these regulations which relate to *cancelation* and *surrender*. We understand, through information obtained from the Department of the Interior and from Mr. Peden, the District Engineer of the United States Geological Survey, that these are the rules and regulations which were in effect during the years 1935, 1936, and 1937, and during all of the period involved in this action. Can it be stipulated, Mr. Brown, Section 27 of these regulations are the rules and regulations of the Department of the Interior regarding leasing of Tribal lands for mining and oil and gas, and that Section 27 reads as set forth in the pamphlet?

Mr. Brown: So far as I know, they are. I don't

have any knowledge otherwise and of course the Court takes judicial notice of them. However, at this time, it is not an objection, but I do want to state my position, that the lease itself contains a provision, and in my opinion relief from the obligations as the Secretary of the Interior sees fit, imposed by the lease, and if it is contended that the regulation in that particular pamphlet are any different from the provisions of the lease itself, why then our contention is that the lease itself controls to that extent the particular regulation. That is no objection, but just a statement.

The Court: Yes. Well, it may be received to be considered by the Court later. [118]

(Defendant's Exhibit No. 7 admitted in evidence and read to the Court by Mr. Corette in words and figures as follows, to-wit:)

"27. A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and recorded release of

record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay advance royalties and rentals in lieu of development annually when due by reason of any subsequent surrender or cancellation of the lease. Upon Cancellation of a lease the lessor shall be entitled to take immediate possession of the land."

Mr. Corette: I might say that the only part of the regulation 27 which we believe adds anything to Section 7 of the lease, or which in any way affects this case, is the first two lines, which read: "A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee." Mr. Brown, for the convenience of the Court, can it be agreed by all concerned that this is a Tribal lease?

Mr. Brown: It is a lease of Tribal lands on the reservation. Does that answer your question? It is a lease of Tribal lands on the reservation. [119]

Mr. Corette: Defendants now offer in evidence Defendant's Exhibit No. 8, which is the formal notice of intent to abandon well, filed by R. E. Lee with the Department of the Interior Geological Survey. It is the original signed by Mr. Lee and Mr. Peden.

Mr. Brown: Objected to as immaterial, has no evidentiary value in the case.

The Court: Well, it seems to me there isn't any



point made in the pleading on it, but I will receive it subject to objection so that we will have the connecting story of the whole theory of the case. [120]

(Defendant's Exhibit No. 8 admitted in evidence subject to objection and read to the Court by Mr. Corette, is in words and figures as follows, to-wit:)

# DEFENDANT'S EXHIBIT No. 8

“Department of the Interior  
Geological Survey

R. E. Lee  
Tribal No. 129  
Serial Number.....  
Lease.....

Received Jun. 6, 1936  
U. S. Geological Survey  
Shelby, Montana

## SUNDRY NOTICES AND REPORTS ON WELLS

Notice of Intention to Drill .....	Subsequent Record of Shooting .....
Notice of Intention to Change Plans .....	Record of Perforat- ing Casing .....
Notice of Date for Test of Water Shut-off .....	Notice of Intention to Pull or Otherwise Alter Casing .....
Report on Result of Test of Water Shut-off .....	Notice of Intention to Abandon Well ..... x
Notice of Intention to Re-drill or Repair Well .....	Subsequent Report of Abandonment .....
Notice of Intention to Shoot .....	Supplementary Well History .....

(Indicate above by check mark nature of report, notice, or other data)

June 4, 1936

Following is a notice of intention to do work on land under lease described as follows:

(State or Territory) Montana.

(County or Subdivision) Glacier.

(Field) Cut Bank.

Well No. 1.

( $\frac{1}{4}$  Sec. and Se. No.) SW 25.

(Twp.) 33 N.

(Range) R 6 W.

(Meridian) M.M.

The Well is located 1845 ft. (*M*) of S line and 330 ft. (*E*) of W line of sec. 25.

The elevation of the derrick floor above sea level is 3631 ft. [121]

#### “DETAILS OF PLAN OF WORK

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate mudding jobs, cementing points, and all other important proposed work.)

Will mud Madison Limestone from bottom of hole to 3146. Will plug top of Madison with lead wool, shutting off water, then cement basal Ellis with 8 to 10 sacks cement. Will bridge hole below Cut Bank sand at approximately 3080 feet, then cement hole to above Sunburst sand at approximately 2840 feet. Will attempt to recover 2000' of 8 $\frac{1}{4}$ " casing which was cemented with 50 sacks of cement at 2535' to shut

off water found in sand at 2420-45, and then mud to surface leaving suitable marker at location. Surface pipe was set at 636 feet and cemented to surface.

Approved June 6, 1936.

Company R. E. LEE

By /s/ R. E. LEE

Title: Lessee.

Address: Cut Bank, Montana.

/s/ W. M. PEDEN

Title: District Engineer, Geological Survey.

Address: Shelby, Montana.

Note:—Reports on this form to be submitted in triplicate to the Supervisor for approval.” [122]

---

Mr. Corette: Defendants now offer in evidence Defendant's Exhibit No. 9, which is a formal report of the subsequent report of abandonment of the well.

Mr. Brown: We object to it, if the Court please, as being immaterial for any purpose in the action.

The Court: The same ruling. [123]

(Defendant's Exhibit No. 9 admitted in evidence subject to objection, is in words and figures as follows, to-wit:)

## DEFENDANT'S EXHIBIT No. 9

“Department of the Interior  
Geological Survey

U. S. land office.....  
R. E. Lee  
Serial Number.....  
Tribal No. 129  
Lease or Permit.....

Received Sep. 2, 1936  
U. S. Geological Survey  
Shelby, Montana

## SUNDRY NOTICES AND REPORTS ON WELLS

Notice of Intention to Drill .....	Subsequent Record of Shooting .....
Notice of Intention to Change Plans .....	Record of Perforating Casing .....
Notice of Date for Test of Water Shut-off .....	Notice of Intention to Pull or Otherwise Alter Casing .....
Report on Result of Test of Water Shut-off .....	Notice of Intention to Abandon Well .....
Notice of Intention to Re-drill or Repair Well .....	Subsequent Report of Abandonment ..... x
Notice of Intention to Shoot .....	Supplementary Well History .....

(Indicate above by check mark nature of report, notice,  
or other data)

August 31, 1936

Following is a report of work done on land  
under lease described as follows:

(State or Territory) Montana.

(County of Subdivision) Glacier.

(Field) Cut Bank.

Well No. 1.

( $\frac{1}{4}$  Sec. and Sec. No.) SW25.

(Twp.) 33 N.

(Range) R 6 W.

(Meridian) M. M.

The Well is located 1845 ft. (N) of S line and 330 ft. (E) of W line of Sec. 25.

The elevation of the derrick floor above sea level is 3631 ft. [124]

### “DETAILS OF PLAN OF WORK

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate mudding jobs, cementing points, and all other important proposed work.)

Mudded and bridged back from 3238-3145. Plugged Top Madison from 3145-35 with 450 lbs. of Lead Wool and 8 sacks cement; shut off sulphur water. Bridged hole at 2976 (base of Cut Bank) and cemented with 54 sacks to cover both Cut Bank and Sunburst sands. Pulled 2000' of  $8\frac{1}{4}$ " casing which was cemented at 2535 with 50 sacks to shut off water from sand at 2420-45. Mudded to surface. 636' of  $10\frac{3}{4}$ " casing left in hole, was cemented to surface with 200 sacks. Cleaned up location, left suitable marker.

Approved Sept. 2, 1936.

Company R. E. LEE

By /s/ R. E. LEE

Title: Lessee.

Address: Cut Bank, Montana.

/s/ D. M. PEDEN

W. M. PEDEN

Title: District Engineer, Geological Survey.

Address: Shelby, Montana.

Note:—Reports on this form to be submitted in triplicate to the Supervisor for approval. Government Printing Office 6—7053”

(The reverse side of Defendant’s Exhibit No. 9 is as follows:)

“Subscribed and Sworn to before me this 2 day of September, 1936.

/s/ J. R. WELLES

Notary Public for the State of Montana. Residing at Cut Bank, Montana. My Commission expires March 31, 1939.

[Notarial Seal]” [125]

---

Mr. Corette: If the Court please, we now offer in evidence Defendant’s Exhibit No. 10, and I think I should make a brief statement as to what this is. The third exhibit to the complaint is a letter dated July 9, to R. E. Lee. It is a letter which required R. E. Lee to show cause why the oil and gas lease involved should not be canceled. This is a dup-



licate original of the statement filed by R. E. Lee in answer to that letter, attempting to show cause why the lease should not be canceled. We do not have here the original; that went to the Secretary of the Interior, but the exhibit introduced by the Plaintiff this morning, namely the letter—I think it is dated February 3, 1938—to Ira L. Quiat acknowledges receipt of this document. Consequently we now offer in evidence Defendant's Exhibit No. 10.

Mr. Brown: We object to it as hearsay, if the Court please, and as being immaterial and a self-serving declaration. It served its purpose before the Secretary, and the Secretary having exercised the discretion that the contract permitted him to exercise, it is of no evidentiary value here.

The Court: It may be received subject to objection.

Mr. Corette: This is an important document and I think it should be read to the Court.

The Court: Very well.

(Defendant's Exhibit No. 10 admitted in evidence subject to objection and read to the Court by Mr. Corette, is in words and figures as follows:)

## DEFENDANT'S EXHIBIT No. 10

“Hon. Harold L. Ickes,  
Secretary of the Interior,  
Washington, D. C.

Dear Sir:

Blackfeet Tribal Lease No. 129  
and Allotted No. 137 [126]

“On September 25, 1935, at a Public Auction held at the Blackfeet Agency, Browning, Montana, Mr. Geo. H. Campbell was the successful bidder on Tract 1 consisting of the  $E\frac{1}{2}E\frac{1}{2}E\frac{1}{2}W\frac{1}{2}NE\frac{1}{4}$  Sec. 27,  $E\frac{1}{2}SE\frac{1}{4}$  Sec. 27,  $SW\frac{1}{4}$  Sec. 26, T 35 N, R 6 W, containing 250 acres and Tract 2 consisting of the  $W\frac{1}{2}NW\frac{1}{4}NE\frac{1}{4}$ ,  $SE\frac{1}{4}$  Sec. 26,  $W\frac{1}{2}W\frac{1}{2}SW\frac{1}{4}$  Sec. 25, T 33 N, R 6 W, containing 220 acres.

“Mr. R. E. Lee negotiated with Mr. Campbell for the two tracts before the lease was drawn and the lease was then drawn as one lease in the name of R. E. Lee.

“A Bond for the sum of \$6,000.00 was obtained by Mr. Lee from the Standard Accident Insurance Co. with Fred Goodstein and the American Iron and Metal Company of Denver, Colorado, as indemnitors.

“On December 9, 1935, the executed Lease and Bond together with a cashier's check for \$740.00 to cover the remainder due on the bonus and the advance annual rental were de-

livered to Mr. O'Hara, Supt. of the Blackfeet Agency.

"Mr. Lee was advised by letter on February 4, 1936, that his lease had been approved as Tribal Lease No. 129 by the Secretary of the Interior as of January 24, 1936.

"Prior to the approval of the lease by the Secretary, Mr. Lee had successfully negotiated with Mr. Fred Goodstein and the American Iron and Metal Company of Denver, Colorado, for the full development of the lease according to the terms of the lease.

"Unusually bad weather prevented Mr. Goodstein and the American Iron and Metal Company from beginning immediate development work but as soon as it was possible a well was begun in the center of the  $W1\frac{1}{2}NW1\frac{1}{4}SW1\frac{1}{4}$  Sec. 25, T 33 N, R 6 W. This location was chosen as being the highest structural position on the lease. [127]

"The well was spudded on March 25, 1936, and diligently drilled in a good workmanlike manner into the upper Cut Bank sand. The upper Cut Bank sand was found at 2900 feet and was 80 feet thick. It was very hard with practically no porosity. Only a slight show of oil was found at 2970 feet.

"The lower Cut Bank sand, which is the main producing horizon in the Cut Bank field, was not present.

"Every effort was made to make a commer-

cial well of the small showing found at 2970 feet by shooting, but they were unsuccessful.

“As soon as it was realized that a commercial well could not be obtained from the small showing in the upper Cut Bank sand, the well was deepened through the very cavey Ellis shale to the top of the Madison lime at 3140 feet where sulphur water was encountered. The well was drilled 100 feet into the Madison limestone as required by the provisions of the lease at great expense because of the water and cavey nature of the Ellis shale.

“The well was then plugged and abandoned according to the regulations and under the supervision of the United States Geological Survey.

“A very difficult and expensive fishing job during the deepening of the well from the upper Cut Bank sand into the Madison limestone resulted in a cost of approximately \$25,000 for the drilling and abandoning of the well.

“Prior to the drilling of the R. E. Lee Tribal 129 No. 1, twelve wells had been drilled to the Madison limestone in the Cut Bank field, none of them found oil and all of them found sulphur water.

“Approximately \$8,000.00 of the total cost of the well was spent to comply with the terms of the lease after it was known that a commercial well could not be obtained. [128]

“Under ordinary field practice a non-commer-

cial well can be abandoned for approximately \$500.00

“During the drilling of the R. E. Lee Tribal 129 No. 1 well, Mr. Lee and associates had obtained at a public sale at Browning, Montana, Allotted Lease No. 137 immediately adjacent to Tribal 129 on the North and to obtain more geological data regarding Lease No. 129, Mr. Fred Goodstein and the American Iron and Metal Company participated in the drilling of a well offsetting Lease No. 129 as shown on the enclosed plat.

“The R. E. Lee Allotted 137 Well No. 1 was drilled 100 feet into the Madison Lime without finding the Cut Bank sand present and finding sulphur water in the Madison Limestone. The cost of this well was approximately the same as for the well on Tribal No. 129.

“This well was plugged and abandoned according to the regulation and under the direction of the United States Geological Survey.

“Subsequent to the drilling of the two R. E. Lee wells, there has been three other wells completed to the South and South and East of the R. E. Lee Tribal No. 129 which have been dry and abandoned, all of them finding the Cut Bank sand very poorly developed or entirely absent.

“These wells have been drilled over a structural range covering the entire Lee Leases.

“It is the opinion of geologists who are fa-

miliar with the entire development of the Cut Bank field that there is practically no chance for commercial production on either of the Lee Leases.

“Prior to negotiations for Tribal Lease No. 129, Mr. Lee discussed the operating regulations and nature of the Bond required with members of the United States Geological Survey.

“He was informed that the Bond required was for the protection of the lease to see that proper drilling, casing and abandonment procedure were followed. He was also informed that should a dry [129] hole be completed on one of the leases and he did not feel justified in further development that he could ask for cancellation of his lease without penalty to himself.

“Quoting from the Notice of Sale of Oil and Gas Leases dated at Browning, Montana, August 30, 1935, which advertised Tract 1 and 2 of which Tribal Lease No. 129 is composed: ‘The lessee will not be required to furnish any special bond but the usual bond prescribed by the regulations of the Secretary of the Interior must be filed.’

“Quoting from Oil and Gas Mining Lease issued to R. E. Lee on Tribal No. 129—Sec. 7: ‘The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein



and the further sum of One Dollar and have this lease cancelled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder, provided, that if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.'

"The Lessee, R. E. Lee, through Fred Goodstein and the American Iron and Metal Company, completed a dry hole that was carried to the depth prescribed in the terms of the lease, and was abandoned under the supervision of the U. S. Geological Survey.

"The lessee participated in the drilling of a well the prescribed depth into the Madison limestone which disproved production on Allotted Lease No. 137 and also further disproved commercial production on Tribal Lease No. 129.

"The lessee and his associates, Mr. Fred Goodstein and the American Iron and Metal Company, did not think there was sufficient chance to find commercial production on either lease to warrant the expenditure of additional money and asked to be released from further [130] obligation without penalty on December 4, 1936.

"Should the Commissioner of Indian Affairs continue to ask for payment on the Bond after a dry hole has been drilled on the lease for failure to drill other dry holes, it will have a

very detrimental effect on future sales of Indian lands in the Cut Bank field. No prudent operator would obligate himself to drill where there is no release except by forfeiture of his Bond should his first venture be unsuccessful.

“In view of the above facts, we feel that we are entitled to have this lease cancelled without penalty.

“Yours very truly

“/s/ R. E. LEE”

---

Mr. Corette: We might say that any reference in here to allotted lease No. 137 should be stricken because that lease is not involved in this action. Is that agreeable, Mr. Brown?

Mr. Brown: That is agreeable.

Mr. Corette: And that the document should be amended by eliminating any reference to Allotted Lease No. 137. Defendants now offer in evidence Defendant's Exhibit No. 11, which is a certified and photostated copy of a letter to the Secretary of the Interior from the Assistant Commissioner of Indian Affairs.

Mr. Brown: We object to this as being immaterial for any purpose, if the Court please.

The Court: Same ruling—may be received subject to objection. [131]

(Defendant's Exhibit No. 11 admitted in evidence subject to objection and read to the Court

by Mr. Corette is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 11

“Refer in Reply  
to the Following:

L-O&G  
67908-35  
64951-37

Address Only the  
Commissioner of Indian Affairs  
  
United States  
Department of the Interior  
Office of Indian Affairs  
Washington

Nov. 17, 1937

“The Honorable  
The Secretary of the Interior

My dear Mr. Secretary:

“Reference is had to Office letter of May 29, wherein recommendation was made to the Secretary that Blackfeet tribal oil and gas mining lease No. 129, in favor of R. E. Lee be cancelled at the request of the lessee and that he be relieved of liability under a bond given to secure performance of the lease. The First Assistant Secretary deemed it inadvisable to approve the recommendation and returned the letter with his memorandum of June 19, pointing out therein that the lessee had failed to

fulfill the obligations contained in Section 4 of the lease requiring the drilling of four wells on the premises during the first year of the lease; and that under the provisions contained in said Section 4, the lessee was liable for the full amount of the bond because of failure to drill the wells. The letter of May 29, and the memorandum of June 19, are included in the attached file with the lease.

“As suggested in the memorandum the matter of terminating liability on the bond was submitted to the Blackfeet Tribal Council. At a meeting held August 9, the council passed a resolution asking that the lease be cancelled for failure to comply with the drilling requirements; and that the amount of the bond be forfeited. There was submitted to the council copy of a letter dated August 12, from the lessee’s attorney, setting forth that the area included in the lease had been adequately tested by the drilling of one well on the leased premises and the drilling of another well on adjoining allotted land also held by the lessee under lease No. 137. Other dry holes have been drilled on lands in adjoining sections. See sketch included in the attached file showing relative location of the tracts and the wells drilled thereon.

“As stated in Office letter of May 29, the Director and the local field officer of the Geological Survey are of the opinion that the lands included in both the tribal and the allotted lease have been adequately tested. [132]

“It is the contention of the attorney for the lessee that the bond given in this case is one for indemnity only; and that there has been no loss to the Blackfeet Indians under the lease; and hence there can be no recovery on the bond. The attorney for the lessee also states that it would be inequitable to hold the lessee for the amount of the bond, and under Section 7 of the lease the Secretary of the Interior may accept the surrender of the lease, and thus relieve the hardship that would result if the bond were forfeited. While he does not definitely so state the lessee apparently believes that under said Section 7 he has the right to surrender the lease at any time during the first year after developing the premises to the extent that it is definitely shown that oil or gas cannot be found in paying quantities. Said Section 7 provides for surrender of the lease “with the consent of the Secretary of the Interior” providing all amounts then due are paid in addition to the surrender fee.

“In view of the provisions of the lease contract and the wishes of the Blackfeet Tribal Council, it is recommended that the lease be cancelled and that the amount of the bond be forfeited for the benefit of the Blackfeet Indians.

“The Tribal Council has requested that the lands be readvertised for lease for oil and gas mining. It is believed that this phase of the

matter should be deferred pending receipt of recommendation from the Superintendent.

“The matter of cancelling allotted lease No. 137 also held by R. E. Lee will be deferred pending final action in the instant case.

Sincerely yours,

/s/ WILLIAM ZIMMERMAN, JR.

Assistant Commissioner.

Approved, Lease Cancelled and lessee and his surety held for the full amount of the bond and the proper conditioning of the leased premises: Jan. 20, 1938.

/s/ OSCAR L. CHAPMAN

Assistant Secretary.

Enclosure No. 1403078” [133]

---

R. E. LEE

called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Corette:

Q. State your name, please.

A. Robert E. Lee.

Q. Where do you live, Mr. Lee?

A. At Cut Bank, Montana.

Q. What is your age? A. Thirty-four.

Q. Are you the Lee who obtained Oil and Gas Tribal Lease No. 129 which has been introduced in evidence in this case? A. Yes.



(Testimony of R. E. Lee.)

Q. Would you please tell the Court whether or not you drilled a well on Oil and Gas Lease No. 129.

A. Yes, I did.

Q. When did you start the drilling of that well?

A. In the latter part of March, 1936.

Q. In what month did you complete the drilling of that well?

A. The early part of June, 1936.

Q. Do you know what the approximate cost of the drilling of that well was?

A. Approximately \$25,000.

Q. Was the well a producing well, or a dry hole?

A. The well was a dry hole.

Q. I now show you, Mr. Lee, Defendant's Exhibit No. 2, and ask you if that is a photostat copy of a letter addressed to the Secretary of the Interior on December 4, 1936, by you? A. Yes, it was.

Q. Is the signature appearing at the end of the letter a photostat of your signature? [134]

A. Yes, it is.

Q. Did you send this letter to the Secretary of the Interior? A. Yes.

Q. Do you remember, Mr. Lee, whether you sent this letter directly to the Secretary of the Interior, or whether you first delivered it to Mr. Duncan, the Supervisor of the U. S. G. S.?

A. Let me see it again, please. This letter, I believe, was sent to Mr. Duncan.

Q. I now, Mr. Lee, show you Defendant's Exhibit No. 10, and ask you to look at the last page and tell the Court whether that is your signature.

(Testimony of R. E. Lee.)

A. Yes, it is.

Q. Is Defendant's Exhibit No. 10 a duplicate original of your office copy of the statement which was delivered to the Secretary of the Interior on your behalf in answer to the letter of July 9, 1937, which is in evidence as having been received by you?

A. Yes, it is.

Q. Was this Defendant's Exhibit No. 10 presented to the Secretary of the Interior on your behalf?

A. Yes, it was.

Q. Did you during the summer and fall of the year 1936 have a geologist make a study of the area involved in this lease and the adjacent area in order to determine the probabilities of producing oil and gas in that territory?

Mr. Brown: Objected to as being incompetent, irrelevant, and immaterial; not within any of the issues of the pleadings; has no evidentiary value; and any study of any geologist can in no way tend to vary the written terms the Government sues on here.

The Court: Well, taking into account the answer, your theory [135] of the case, what do you intend to show—that this geologist made a report to the Secretary of the Interior?

Mr. Corette: That a geologist made a report to Lee, which is the bases of his statement to the Secretary of the Interior. The answer in the third affirmative defense alleged the exact question that I now have asked Mr. Lee—the probabilities of producing oil and gas in this area—which information

(Testimony of R. E. Lee.)

he used at the time that he filed his application for surrender, dated December 4th.

The Court: I will permit you to briefly cover that and see whether his report was based upon the report of his geologist.

Q. Did you in the summer and fall of 1936 have a geologist make a study and report on the probabilities of producing oil and gas from Tribal Lease No. 129? A. Yes, I did.

Q. Was that report completed and given to you prior to the time that you prepared and filed Defendant's Exhibit No. 2, which is the letter of December 4, 1936, to the Secretary of the Interior?

A. Yes.

Q. Who was the geologist that made that report?

Mr. Brown: If the Court please, in order to save time and not interrupt, may it be understood that I object to this entire line of evidence upon the grounds I have already stated?

The Court: Very well, that may be understood.

A. Mr. J. E. Hupp of Cut Bank.

Q. Was that report one of the reasons why you filed your letter dated December 4th, which is Defendant's Exhibit No. 2? A. Yes.

Q. What was the nature of that report? [136]

A. It was very unfavorable.

Q. And what was the nature of it as to whether there was any reasonable probability, or whether or not there is any reasonable probability of producing oil and gas on the land involved?

(Testimony of R. E. Lee.)

A. Geologically, there was no chance of getting commercial production.

Q. Was that the contents of the report which was made to you? A. Yes.

Q. At the time that you filed with the Secretary of the Interior the application for consent to surrender, contained in Defendant's Exhibit No. 2, had you paid all of the rentals and bonuses required under that lease? A. Yes, I had.

Q. Was there anything at that moment which you were obliged to do under the lease which you had not done?

Mr. Brown: Objected to as calling for the witness' conclusion.

The Court: Yes, sustained.

Mr. Corette: We will withdraw the question. Mr. Lee, did you also on or about December 4, 1936, and at the time that you applied for surrender of this lease, surrender the lease?

A. Yes, applied for permission to surrender.

Q. That is, you filed this application with the Government? A. Yes.

Q. At the same time did you surrender the lease? A. Yes.

Q. At the same time did you abandon the property? A. Yes.

Q. And move off the property all of your equipment? A. Yes.

Q. Was this lease ever recorded, Mr. Lee? [137]

A. No.

Q. By not being recorded, you mean that it was

(Testimony of R. E. Lee.)

not placed on record in Glacier County, Montana?

A. That is right, yes.

Mr. Corette: That is all, Mr. Brown.

Cross Examination

By Mr. Brown:

Q. Mr. Lee, in September, 1935, you entered into a lease with the United States of certain land on the Blackfeet Indian Reservation. You know that, do you? A. Yes.

Q. Now before you entered into the lease, did you have any geologist go over the land and advise you as to what prospects you had of getting gas or oil there? A. Yes.

Q. You had that? A. Yes.

Q. You entered into the lease then with the view of the knowledge or information that you gained from the geologist you employed? A. Yes.

Mr. Brown: That is all.

Mr. Corette: That is all.

---

J. E. HUPP

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Corette

Q. State your name, please.

A. J. E. Hupp.

(Testimony of J. E. Hupp.)

Q. What is your residence, Mr. Hupp.

A. Cut Bank, Montana.

Q. How long have you lived at Cut Bank?

A. About ten and a half years. [138]

Q. What is your occupation or profession?

A. Oil geologist.

Q. How long have you been engaged in this profession of oil geologist?

A. About nineteen years.

Q. What education did you have as an oil and gas geologist?

A. Graduate of the University of Colorado, geologist; B. A. degree in geology.

Q. When you say "oil" does that include gas as well as oil?      A. Yes, sir.

Q. What experience have you had in your profession as oil geologist, and in what localities?

Mr. Brown: We admit the witness' qualifications as a geologist.

Mr. Corette: I think as to the Cut Bank area, we would like to show what knowledge he has of special wells there. As to his general qualifications, then that is all right.

The Court: Very well.

Q. Please tell the court, Mr. Hupp, exactly what experience you have had in connection with the oil and gas wells and oil that is discovered—production, in the Cut Bank oil and gas.

A. I was present when the first well was drilled in the Cut Bank gas field, and I was present when



(Testimony of J. E. Hupp.)

practically the first 150 wells were drilled. Studied the cuttings and samples and I have studied most of the interesting wells since that time. I have lived in that area continuously for ten and a half years.

Q. Have you practiced your profession in that area ever since the Cut Bank field was first discovered?      A. Yes, sir.

Q. Have you studied the results of every well of any consequence that has been drilled in the Cut Bank field? [139]      A. Yes.

Q. What experience have you had, or what knowledge do you have of the well which was drilled on Oil and Gas Tribal Lease No. 129?

A. I studied the sample on it from the beginning. I was geologist on that well for Mr. Lee.

Q. As geologist on that well for Mr. Lee, were you present during most of the time the well was being drilled?      A. Yes, sir.

Q. Were you present at the time the well was drilled in?      A. Yes, sir.

Q. Did you study the well as it was being drilled, of the structures through which it was being drilled?      A. Yes.

Q. What connection did you have with the well which was drilled on Allotted Indian Lease No. 137?

Mr. Brown: If the Court please, we object to any further testimony on the ground it is incompetent, irrelevant, and immaterial; that its only purpose is to vary the terms of the written instru-

(Testimony of J. E. Hupp.)

ment, and that it is not competent for that purpose.

Mr. Corette: He is the geologist.

The Court: Objection is as to all the evidence. It may be received over the objection.

A. I was geologist on that well.

Q. On well lease No. 137? A. Yes, sir.

Q. What familiarity did you have with each and every other well which was drilled in the vicinity of Tribal Lease No. 129?

A. I studied the results of all of them.

Q. And did you in the summer and fall of 1936, make a geological study and report for R. E. Lee to determine whether in your [140] opinion there was any reasonable probability of producing oil and gas from Tribal Lease No. 129? A. I did.

Q. And during what period of time did you make that study?

A. I originally made a study for Mr. Lee before he purchased the land, and during the time the wells were drilled, I continuously studied that area and studied the surface out-crops and all surface data that was available.

Q. Did you advise Mr. Lee of your conclusions?

A. I did.

Q. Do you recall when that was that you advised Mr. Lee of your conclusions?

A. It was after the completion of the well on allotted 137.

(Testimony of J. E. Hupp.)

Q. Do you recall approximately what month that was during the year 1936?

A. It was in November, I think, I gave him my report.

Q. I now show you Defendant's Exhibit No. 2, dated December 4, 1936, to the Secretary of the Interior, and ask you if you aided Mr. Lee in the preparation of that document? A. I did.

Q. At that time had you advised Mr. Lee as to your opinion regarding whether oil and gas could be produced from land described in the document?

A. I had.

Q. And what was your opinion, Mr. Hupp, as to whether there was any reasonable probability of producing oil and gas from the land involved in Lease No. 129?

A. I advised that I thought there was no chance for him to find oil in commercial quantities.

Q. I now show you Defendant's Exhibit No. 10 and ask you if you [141] also aided Mr. Lee in the preparation of that document? A. I did.

Q. What have you to say as to whether the statements contained in Defendant's Exhibit No. 10 are true?

A. To the best of my knowledge, they are.

Q. Have you read it over? A. Yes, sir.

Q. Tell the Court whether or not the statements contained in Defendant's Exhibit No. 10 are matters which were within your knowledge at the time that the exhibit was prepared—the document was prepared? A. They were.

(Testimony of J. E. Hupp.)

Q. You say that they were true at that time?

A. Yes, sir.

Q. What is your present opinion, Mr. Hupp, as to whether there is any reasonable probability of obtaining production from the lands contained in Lease No. 129?

A. I think my opinion is just the same as it was then. There has been no development that shows that it would be any more favorable.

Q. Mr. Hupp, I now show you Defendant's Exhibit No. 12, and I will ask you if that is a map prepared by you? A. It is.

Q. Is it a map which shows the location of the land covered by Tribal Lease No. 129 and the surrounding lands? A. It is.

Q. Does it correctly show the location of the various lands in that locality? A. It does.

Q. Does it also correctly show the location of certain wells [142] and dry holes which have been drilled in that locality? A. It does.

Q. Was it prepared by you? A. Yes, sir.

Mr. Corette: We now offer in evidence Defendant's Exhibit No. 12.

Mr. Brown: Make the same objection, that it is immaterial for any purpose.

The Court: May be received subject to objection.

(Defendant's Exhibit No. 12 received in evidence subject to objection, is a map.)

(Testimony of J. E. Hupp.)

Q. Now, Mr. Hupp, referring to the land on Defendant's Exhibit No. 12 which is colored in green, please tell the Court what that land is?

A. That's Tribal Lease No. 129, R. E. Lee.

Q. That is the Lee involved in this action?

A. Yes.

Q. And the land just North of the land colored in green, which is marked R. E. Lee, Al. 137, tell the Court what that is.

A. That is an allotted lease Mr. Lee had.

Q. Do you have a colored pencil with you of any kind?      A. Yes, sir.

Q. I wonder if you would draw a circle around the wells drilled on lease 129 and the other dry holes drilled in that area which you studied, made your geological study.

(Witness indicated various points on the map.)

Q. Mr. Hupp, you have now drawn a red circle around twelve spots which are marked on Defendant's Exhibit No. 12. Tell the Court what those circles represent.

A. They are circles around dry holes in this area; wells that were drilled non-productive. [143]

Q. On Defendant's Exhibit No. 12, does the little black circle with the cross inside of it, which appears inside of each red circle, indicate a dry hole?      A. It does.

Q. Tell the Court which, if any, of those dry holes were drilled prior to December 4, 1936?

(Testimony of J. E. Hupp.)

A. I think all but one of them.

Q. Which one was drilled after that?

A. I believe this well was drilled after that.  
(indicating)

Q. That is the well marked No. 3 on "TR. 121," Section 36?      A. Yes, sir.

Q. Tell the Court what this heavy red line is which appears in the Southeast portion of the map, and in the Northeast portion of the map—what it represents.

A. It represents what I consider the area, or a border, between productive territory and non-productive.

Q. And which side of the red line do you consider productive territory, and which side do you consider non-productive territory?

A. On the left-hand side of the lower red line, and on the right-hand side of the upper red line.

Q. In order to have that clarified for the record, do I understand you correctly to mean that all of the land shown on the map which is West of the lower red line and in Section 26-35 to 34-27 is non-productive area?      A. I think it is.

Q. Is it your opinion that the area which appears near the Easterly or right-hand edge of the map as you look at it in Sections 1 and 36 is productive area?

A. It is poorly productive. There isn't a commercial lease. [144] The element hasn't shown a commercial lease represented on that map in that area.



(Testimony of J. E. Hupp.)

Q. But the land to the West of the red line has been entirely non-productive?

A. That is right.

Q. From the *geological which* you have made, is it your opinion that this area to the West or left of the line is non-productive? A. Yes.

Q. Referring to the red line in the upper right hand corner of the Northeast corner of the map. What is that red line?

A. There is a little production in that area to the West of that red line, but it isn't commercial.

Q. To the West and North of the red line in the upper right-hand corner of the map. Now referring to the area between the two red lines in Sections 24, 25, and 26. What have you to say as to whether that land is productive or not?

A. I don't think it is productive.

Q. Tell the Court what you mean when you say it is or is not productive insofar as the presence of producing sands in that area are concerned.

A. In the Cut Bank field the main producing is what they call lower Cut Bank. It is a very distinctive sand, coarse, black chert sand, and in some areas we have what we call Ellis Island, which are places here in Ellis formation, which lies at Cut Bank sand; was an island in the seas at the lower Cut Bank sand; was deposited and where these islands occurred, there would be no deposit of lower Cut Bank and sand. It is my opinion in this area that at the time of the deposition of the lower Cut

(Testimony of J. E. Hupp.)

Bank sand this was an island, and that there was no lower Cut Bank sand deposited there. [145]

Q. This area shown on the map West of the red line was Ellis Island at the lower cut bank sand and you say there was no lower cut bank sand deposited in that area. A. That is right.

Q. That is why you believe there is no production in that area? A. That is right.

Q. Is that information rather definitely ascertainable from the drilling which has been carried on in the area?

A. Everything indicates that, yes sir.

Q. Tell us what the lines between the letter "A" and "A" prime, and the line between the letter "B" and "B" prime indicate?

A. They are connections between wells which I have used to bring about cross-sections of that area showing sand conditions.

Q. Mr. Hupp, I now refer to Defendant's Exhibit No. 13 and ask you if that is a cross-section, and which you have said you prepared?

A. I did.

Q. And also to Defendant's Exhibit No. 14, and ask you if that is also one of the cross-sections to which you have referred? A. It is.

Q. Which cross-section is it that refers to line "A" to "A" prime appearing on Exhibit No. 12?

A. The top one.

Q. The Defendant's Exhibit 13 is the cross-section of the area located underneath the line "A" to "A" prime? A. That is right.

(Testimony of J. E. Hupp.)

Q. And is Defendant's Exhibit No. 14 the cross-section of the structures located beneath the ground along the line "B" to "B" prime?

A. That is right. [146]

Q. Do those cross-sections show the comparative elevation above sea level of the various structures which you have found in the drilling of the wells appearing in the various cross-sections?

A. It shows elevation above sea level, the different formations.

Q. What are the formations referred to on the cross-section?

A. The bottom formation, the Madison Lime.

Q. That is the dark formation is the Madison Lime stone?

A. This is Madison Lime in here. (indicating)

Q. The Madison Lime is the black-like looking formation below the gray formation and at the very bottom of Defendant's Exhibits Nos. 13 and 14?

A. Yes, sir.

Q. What is the grayish formation above the Madison Lime stone?

A. Ellis Shale.

Q. That is the gray formation to which I am now referring. The orange formation which appears above the Ellis Shale, what is that?

A. Upper cut bank sand.

Q. The reddish formation appearing above the upper cut bank sand?

A. That is varigated shale break between the upper cut bank sand and the Sunburst sand.

(Testimony of J. E. Hupp.)

Q. And what is the yellow colored formation appearing at the top? A. The Sunburst sand.

Q. Now referring to Defendant's Exhibit No. 13. Tell the Court whether it shows the Cross-section of the Patterson-Cole No. 1 well, which is located on Defendant's Exhibit No. 12?

A. It does. It is this well here. (indicating)

Q. Is the Patterson-Cole well the well in Section 2 in the piece of land "Phil I. Cole?" [147]

A. It is.

Q. Does Defendant's Exhibit No. 13 also show a cross-section of R. E. Lee No. 1 well on Tribal Lease 129? A. It does.

Q. And that is the well located near the West line of Section 25? A. That is right.

Q. Does it also show the Cross-section of the R. E. Lee No. 1 well on Allotted Indian Lease 137?

A. It does.

Q. That is the well appearing on Defendant's Exhibit No. 12 near the middle of Section 26?

A. That is right.

Q. Does it also show the same thing for the Texas Company, Lennon No. 1 well?

A. That is right.

Q. Where is the Texas Company-Lennon No. 1?

A. Located in Section 24.

Q. Now referring to Defendant's Exhibit No. 14. Does it show a cross-section of the R. E. Lee allotted well No. 137?

A. It does. This one here. (indicating)

(Testimony of J. E. Hupp.)

Q. That is the same well near in the section of 26 which is referred to on Defendant's Exhibit No. 13? A. That is right.

Q. Does Defendant's Exhibit No. 14 then also show a cross-section of the Lee No. 1 Well on Tribal 129? A. It does.

Q. That is the well which is involved in the action here? A. That is right.

Q. Does it show the same type of cross-section for the Sauter-Tweedy No. 2 well? [148]

A. It does.

Q. The Sauter-Tweedy No. 2 well is located in the Southwesterly part of Section 25?

A. That is right.

Q. It is Easterly of the red line on Defendant's Exhibit No. 12? A. That is right.

Q. Being Easterly it is in what you consider the poor producing area? A. That is right.

Q. Does Defendant's Exhibit No. 14 also show a cross-section of the Par Oil Company, Tweedy No. 2 well? A. That is right.

Q. Where is that located, the Par Oil, Tweedy No. 2 well? Is it located in the Northeast of Section 36? A. That is right.

Q. Is it in the poor producing area to which you referred? A. That is right.

Q. Do Defendant's Exhibits Nos. 13 and 14 correctly show the cross-sections and the various wells which they represent? A. Yes, sir.

Q. And in your opinion do they correctly show

(Testimony of J. E. Hupp.)

the structures, underground structures which exist in those wells?

A. They show above sea level and the formation encountered.

Q. Do they show the depths of those formations?

A. No, they don't.

Q. Can the depth of the formation be measured by reading the above sea level figures which appear on the left side of the exhibit, and comparing those to the formation?

A. No, the depth if you had the surface——

Q. I mean the distance from the top or bottom of each formation? [149]

A. Oh, yes, it does show that.

Q. That is by looking at Defendant's Exhibit No. 14 or No. 13, and looking at the numbers appearing on the left-hand side, and then looking at the length of the yellow coloring, you can determine how much upper cut bank there was in the well?

A. Approximately.

Mr. Corette: We offer in evidence Defendant's Exhibits Nos. 13 and 14.

Mr. Brown: Objected to as immaterial, without the issues, of no evidentiary value.

The Court: The same ruling, received subject to objection.

(Defendant's Exhibits Nos. 13 and 14 received in evidence subject to objection, are cross-sections.'')



(Testimony of J. E. Hupp.)

Q. For the information of the Court and of the people here, tell us how far below the surface the Sunburst sand is found on the wells appearing on Defendant's Exhibits Nos. 13 and 14.

A. I can't tell from the cross-section how far below the surface they are.

Q. Just approximately?

A. Well, between twenty-seven and twenty-eight hundred feet.

Q. These cross-sections do not attempt to show the various formations above the Sunburst sand?

A. That is right.

Q. Now referring to Defendant's Exhibit No. 13, tell the Court whether there is any lower cut bank sand shown on the wells appearing on Defendant's Exhibit No. 13.

A. There is no lower cut bank sand present.

Q. Tell the Court whether that indicates an absence of the lower cut bank sand in the area referred to on Defendant's Exhibit No. 12 by the line "A" to "A" prime? [150]

A. That is right.

Q. By indicating an absence of the cut bank sand, does it indicate an absence of any producing sand in that area?

A. It does.

Q. Referring to Defendant's Exhibit No. 14. Tell the Court what the exhibit shows regarding the presence of lower cut bank sand?

A. It shows on Tweedy No. 2, Par Oil, Tweedy No. 2, that there was lower cut bank sand present developing in that area.

(Testimony of J. E. Hupp.)

Q. Do I understand that you mean that Defendant's Exhibit No. 14 shows some lower cut bank sand in the Sauter-Tweedy No. 2 well, and the Par Oil Company-Tweedy No. 2 well?

A. That is right.

Q. Now are those wells shown on Defendant's Exhibit No. 12 to the East of the red line?

A. They are.

Q. Are they in what you described as poorly producing area?

A. That is right.

Q. Tell the Court whether the lower cut bank sand as shown by your cross-section disappears entirely where the line "B" to "B" prime crosses the red line on Defendant's Exhibit No. 12?

A. That is right.

Q. Is any lower cut bank sand found from the point "B" on Defendant's Exhibit No. 12 to the red line which appears near the Easterly edge of the exhibit?

A. No.

Q. In your opinion do these cross-sections which you have prepared along lines "A" to "A" prime, and "B" to "B" prime clearly indicate whether the lower cut bank or producing sand is present under the land included in Tribal Lease No. 129?

[151]

A. They indicate that it isn't present.

Q. That it isn't present under the land included in Tribal Lease No. 129?

A. That is right.

Q. Does that indicate whether any production could be expected from the land included in Tribal Lease No. 129?

(Testimony of J. E. Hupp.)

A. That indicates that, yes sir.

Q. Now Defendant's Exhibit No. 10 states that there was sent with it to the Secretary of the Interior a plat showing the location of the various wells or dry holes. Did you prepare that plat?

A. I did.

Q. Do you have any copy of it?

A. No, I have no copy.

Q. Tell the Court whether that plat showed the relative location of the R. E. Lee Tribal Lease No. 129, and the other dry holes which have been lettered?

A. It shows approximately the same area that this map does.

Q. And did it show the same wells which appear on this map?           A. Yes, sir.

Q. Insofar as they had been drilled at that time?           A. Yes.

Mr. Corette: We offer Exhibit No. 12 in evidence.

Mr. Brown: Objected to as incompetent, irrelevant, and immaterial for any purpose.

The Court: Same ruling.

(Defendant's Exhibit No. 12 admitted in evidence subject to objection, is a map.)

Q. What have you to say as to whether the well which appears on Defendant's Exhibits Nos. 12, 13, and 14 has been given an adequate test of the entire structural area contained in [152] Tribal Lease No. 129?

(Testimony of J. E. Hupp.)

A. I think they have.

Q. Please tell the Court whether the well on Tribal Lease No. 129 on which you were geologist, whether the drilling and abandonment was supervised by a representative of the United States Geological Survey? A. It was.

Q. Did he represent the Department of the Interior? A. Yes, sir.

Q. Was that Mr. Peden, who is sitting here?

A. I think at the time we drilled that well Mr. Haseider was there most of the time.

Q. Is he one of Mr. Peden's assistants?

A. Yes, sir.

Q. And a geologist for the United States Geological Survey?

A. He is Assistant District Engineer.

A Voice: He is associate engineer.

Q. Please tell the Court, Mr. Hupp, whether the well which was drilled on the land covered by Tribal Lease No. 129 was located at the most desirable point from the standpoint of the possibility of producing oil and gas?

A. It was as far as we are able, it was the best location we could pick.

Q. Why do you consider that the best location for a well on Tribal Lease No. 129?

A. It is the highest structural position and the nearest to known presence of lower cut bank sand.

Q. Tell the Court whether, from a time standpoint, it would have been possible to drill three

(Testimony of J. E. Hupp.)

more wells on Tribal Lease No. 129 between December 4, 1936, the date of the application for surrender, [153] and January 24, 1937, which would have been one year from the date that Tribal Lease No. 129 was approved by the Secretary of the Interior?

Mr. Brown: Objected to as immaterial, an attempt to vary the issues of the case as made by the pleadings, the undisputed fact being that three wells weren't there at that time.

Mr. Corette: I thought it was immaterial until it came up in the pre-trial conference.

The Court: I suppose you want to put that in as having some bearing on the strength of the lease, the standing of the lease, at the time. It may go in subject to objection.

A. After we drilled the second well, the well on R. E. Lee, the 137, the requirements to drill to the Madison Lime were eliminated, that in the time of drilling the well, quite a bit—I would say with reasonable luck in all, we could drill three wells easily in that length of time.

Q. In the period between December 4, 1936, and January 24, 1937.

Mr. Corette: That is all.

#### Cross Examination

By Mr. Brown:

Q. How long does it take to drill a well?

A. They have been drilled by cable tools in

(Testimony of J. E. Hupp.)

about twenty days. That is through cut bank sand.

Q. How long did it take to drill the well that was drilled? A. Seventy-one days.

Q. Were you using equipment that was standard equipment, or ordinarily used in that section of the country, in drilling that well?

A. Well, it wasn't too good. The equipment, the derrick was pretty light, and in case the rig was pulled—I would say with good standard tools it could be easily drilled in [154] thirty-five days.

Q. With the equipment and tools, how long would it take?

A. They had lots of good contractors that were available to drill wells there.

Q. But my question is with the equipment and tools, how long would it take to drill a well?

A. I would say anywhere from twenty days to four months. Never can tell, not with *those* equipment.

Q. You have placed some red circles on the map. What are they?

A. The circles around—symbol of dry hole been drilled in that area.

Q. Now you have one just to the North of Section 26. How far is that from the boundary of the section? Is your map drawn to scale?

A. Yes, sir.

Q. Well you come and tell me how far this dry hole is from that R. E. Lee plot?

A. I can't tell you exactly. It is less than six hundred feet. I can tell you that, but that is all.



(Testimony of J. E. Hupp.)

Q. That is as close as you can come. It is an estimate that it is less than six hundred feet?

A. That is without scale, yes, sir.

Q. Now how far is this one that you have indicated with a letter "A" that is next to the Texas Co., how far is that from that section.

The Court: What do you mean? From the dry hole on 26?

Q. This ground, how far is this hole from that ground there?

A. About three-quarters of a mile—about that.

Q. That is as accurately as you can tell us?

A. Without scaling it. [155]

Mr. Corette: Do you have a scale?

The Witness: No, I haven't.

Mr. Corette: Could you use this ruler?

The Witness: I can tell approximately. (measuring) About a mile.

Q. (By Mr. Brown) In Section 2 you have another one indicated. How far is that from this leased land that R. E. Lee had?

A. About a mile and a half.

Q. Now are there any producing wells in the vicinity of the R. E. Lee land?

A. Closest one is about a quarter of a mile.

Q. How many producing wells are there in that vicinity?

A. Well, it shows twelve on the map, I think. It shows there on the map.

Q. It shows twelve producing wells on the map?

(Testimony of J. E. Hupp.)

A. Yes, sir.

Q. What distance are they from this R. E. Lee land; R. E. Lee had leased?

A. All the way from a mile and a half to a quarter of a mile.

Q. They vary from a quarter of a mile to a mile and a half, is that it? A. Yes, sir.

Q. They are equally as close as the dry holes you have indicated there, are they not?

A. Not as the dry hole on the lease.

Q. That is the one *hold* on the lease?

A. There is another one next to it.

Q. Drilled on that lease?

A. No, just off the edge of it.

Q. With the equipment that Lee had, on the leased land, how long [156] would it take to drill a well one hundred feet into the Madison Lime stone?

A. Well, it would depend. It varies at different places.

Q. Well, depend on what?

A. Would depend on the condition of your water, what kind of pipe you had in the hole—a lot of conditions.

Q. In other words, you can't answer that question? A. No.

Mr. Brown: That is all.

(Testimony of J. E. Hupp.)

Redirect Examination

By Mr. Corette:

Q. Mr. Hupp, tell the Court what delays were incurred which required the seventy-one days to drill the well on Tribal Lease No. 129.

A. The chief one was a fishing job. They lost their tools and they had to fish them out.

Q. Was there, or was there not any delay in connection with the decision on the question of whether the United States Geological Survey would require the drilling of the well into the Madison Lime?

Mr. Brown: Objected to as entirely immaterial; the lease speaks for itself.

The Court: Sustain the objection.

Q. Can you tell us, Mr. Hupp, why the well drilled on Tribal Lease No. 129 cost as much as \$25,000.00?

A. Why it cost as much?

Q. Yes.

A. Well, they encountered water, for one thing, around twenty-five hundred feet; had to run a string of casings there and cement it in, and when they abandoned the well, they couldn't recover the casings; they also had cemented the surface casings clear to the surface. There was no recovery price there. [157] In drilling, after they shot this well, in an endeavor to make a commercial well out of it, why they developed lots of cavey chunks to fall in, which resulted in this expensive fishing

(Testimony of J. E. Hupp.)

job; and encountering the water in the top of the Madison Lime caused Ellis shale to cave and you had to fight that cave in drilling any deeper.

Q. Does the distance from the R. E. Lee Tribal Lease No. 129 lands to any producing well have any bearing on the possibility of production if the lower cut bank sand pinches out between the two points?

A. The whole area as indicated is very poor area. There isn't a lease on that map that is commercial, that has even commenced to pay back the money put in it.

Mr. Corette: If the Court pleases, the defendants rest, and for the purpose of the record, we would like to make a motion.

The Court: Any rebuttal?

Mr. Brown: We rest. No rebuttal.

---

Mr. Corette: Comes now the defendants, and each of them, at the close of all the evidence in the case and moves the Court for a dismissal of the case and for judgment for and on behalf of the defendants and against the plaintiff in the case on the following grounds and for the following reasons: First, the *the* lease contains paragraph 7, which provides as follows: "7. The *less* may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as pro-

vided herein and the further sum of one dollar and have this lease canceled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder; Provided, This if this lease has been recorded, lessee shall [158] execute a release and record the same in the proper recording office."

Second, that the lease contains paragraph 8, which provides as follows: "8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties."

Third, That Regulation 27 of the regulations covering the leasing of tribal lands for mining purposes, approved by the Secretary of the Interior, reads in part, and insofar as pertinent, as follows: "A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee."

Fourth, That Lee, at a time when the lease was in good standing, surrendered the lease and applied to the Secretary of the Interior for consent to surrender in the manner provided in paragraph 7 of the lease and Article 27 of the Regulations, and did all things necessary to obtain the Secretary's consent to surrender, and complied with every requirement of paragraph 7 of the lease, Article 27 of the regulations, and the entire lease.

Fifth, That Regulation 27 provides that a lease will be canceled by the Secretary of the Interior for good cause upon application of the lessee, and that Lee presented good cause to the Secretary of the Interior for cancelation, and for consent to surrender, for which he had applied, by showing that the area had been tested and proven non-productive, and [159] by showing that there was no reasonable probability of obtaining production from the area included in the lease; and by showing that further drilling on the land involved would be useless and an economic waste and not justified; and by showing that he had complied with all of the provisions of the lease with which he had to comply up to the time that he surrendered the lease and applied to the Secretary of the Interior for consent to that surrender; and by showing that he had done everything necessary and taken all steps necessary to surrender the lease, and to obtain the Secretary of the Interior's consent to surrender.

Sixth, That there were no facts to justify the Secretary of the Interior's refusal to consent to the surrender of the lease by Lee.

Seventh, That the Secretary of the Interior's refusal to consent to the surrender was arbitrary, unreasonable, unsupported by any facts, contrary to law.

Eighth, That there is no evidence of any damage to the plaintiff or anyone else in this case, and there is no basis for the plaintiff's claim for \$6,000,



and the plaintiff is attempting to enforce a penalty which is unreasonable, illegal, and contrary to law.

The Court: Very well, it will be taken under advisement. I suppose you will renew your motion?

Mr. Brown: We renew our motion for judgment in accordance with the allegations of the pleadings.

Mr. Corette: May we have a period of time within which to file a brief?

The Court: Yes, I think perhaps you will want to have a transcript of the testimony written up. Upon receipt of the transcript, how much time do you desire—thirty days? [160]

Mr. Corette: That would be ample.

The Court: Thirty days on the side, thirty days to reply—we will make it thirty days all around—thirty on the side upon receipt of the transcript. Gentlemen, don't make these briefs any longer than you feel is absolutely necessary, because you know I have other things to do.

Mr. Corette: Do we file our briefs simultaneously?

Mr. Brown: We expect to file our brief first.

The Court: Yes, you file your brief first, then you have thirty days after receipt, and they will have thirty days to reply. [161]

[Endorsed]: Filed Sept. 22, 1942.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

Appellants, R. E. Lee and Standard Accident Insurance Company, a corporation, defendants above named, hereby and herewith designate the contents of the record on appeal in the above entitled matter as follows:

The complete record and all the proceedings and all the evidence in the above entitled matter.

Filed herewith are two copies of the reporter's transcript of the evidence included in this designation.

Dated this 22nd day of September, 1942.

CORETTE & CORETTE

By KENDRICK SMITH

Attorneys for Appellants, R.  
E. Lee and Standard Accident Insurance Company, a corporation.

Address: 619 Hennessy Bldg.,  
Butte, Montana.

Service of the foregoing Designation of Contents of Record on Appeal acknowledged this 22nd day of September, 1942.

W. D. MURRAY

Assistant Attorney of the  
United States, in and for  
the District of Montana.

[Endorsed]: Filed Sept. 22, 1942. [163]

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF  
ORIGINAL EXHIBITS

Upon application of counsel for R. E. Lee and Standard Accident Insurance Company, a corporation, appellants herein, and it appearing to the Court that Exhibits numbers 12, 13 and 14 received in evidence at the trial of the cause should, by reason of their form and contents, be sent to the appellate court in lieu of copies under Rule 75, section (i) of the Rules of Civil Procedure,

It Is Hereby Ordered that such original Exhibits numbers 12, 13 and 14 be by the Clerk of this Court duly certified to the United States Circuit Court of Appeals for the Ninth Circuit and transmitted to the said Clerk of the Circuit Court of Appeals by mail with the record on appeal in said cause, said Exhibits to be *turned* to the Clerk of this Court after the final disposition of said appeal according to the practice of the Clerk of said Circuit Court of Appeals.

Dated this 26th day of September, 1942.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and entered Sept. 28, 1942.

[165]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD

United States of America  
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 166 pages, numbered consecutively from 1 to 166 inclusive, constitutes a full, true and correct transcript of all portions of the record in Case Number 150, United States of America versus R. E. Lee, et al, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, original exhibits Numbers 12, 13 and 14, which were offered and received in evidence at the trial of said cause.

I further certify that the costs of said transcript amount to the sum of Thirty-two and 50/100 (\$32.50) Dollars, and have been paid by the appellants.

Witness my hand and the seal of said Court at

Great Falls, Montana, this 22nd day of October,  
A. D. 1942.

[Seal]

C. R. GARLOW,

Clerk as aforesaid,

By C. G. KEGEL

Deputy Clerk [166]

---

[Endorsed]: No. 10293. United States Circuit Court of Appeals for the Ninth Circuit. R. E. Lee and Standard Accident and Insurance Company, a corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed October 26, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
For the Ninth Circuit

No. 10293

R. E. LEE and STANDARD ACCIDENT IN-  
SURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL AND  
DESIGNATION OF CONTENTS OF REC-  
ORD ON APPEAL, SUBDIVISION 6 OF  
RULE 19 (C.C.A.)

#### STATEMENT OF POINTS ON APPEAL

Appellants and Defendants, R. E. Lee and Standard Accident Insurance Company, hereby specify the following points upon which they intend to rely on the appeal in the above-entitled matter:

1. That the Court committed error in refusing and denying Defendants' Motion for Judgment, made at the time of trial, for each and every reason and point specified therein. (T. pp. 158-160).

2. That the evidence was insufficient to justify the Judgment against these Defendants and Appellants, or either of them, and that the said Judgment was contrary to the evidence. (T. pp. 95-96).



3. That the evidence was insufficient to justify the Findings by the Court as set forth in Findings of Fact numbered VI, VII, VIII and IX, (T. pp. 79-80) and that said Findings, and each of said Findings, were against the clear weight of the evidence and were clearly erroneous.

4. That the evidence was insufficient to justify the Court in concluding as it did in Conclusions of Law numbered II and III (T. pp 80-81), and that said conclusions, and each of them, were contrary to and against the clear weight of the evidence and were clearly erroneous.

5. That there was credible evidence to support, and no evidence of any kind to disprove, Defendants' Proposed Findings of Fact numbered VI, VII, VIII, IX, X, XI, XII, XIII and XIV, and each of them, and that the Court was in error in refusing to adopt said Proposed Findings of Fact, and each of them. (T. pp. 87-90).

6. That the Court was in error in refusing to adopt Defendants' Proposed Conclusions of Law numbered II, III, IV and V, and each of them. (T. pp. 90).

7. That the Court erred in rendering its opinion in favor of the United States of America, Appellee and Plaintiff. (T. pp. 92-93).

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Appellants, R. E. Lee and Standard Accident Insurance Company, a corporation, hereby designate under Subdivision 6 of Rule 19 (C.C.A.) the following portions of the certified typewritten Transcript of Record in the above-entitled cause on file herein to be contained in the printed record on the appeal of said Appellants:

1. Names and addresses of attorneys of record. (T. p. 1).
2. The Complaint. (T. pp. 3-18).
3. The Answer of R. E. Lee and Standard Accident Insurance Company. (T. pp. 31-42).
4. Plaintiff's Motion for Judgment on the Pleadings. (T. pp. 46-48).
5. Defendants' Cross Motion for Judgment on the Pleadings. (T. pp. 50-51).
6. Order Denying Motions for Judgment on the Pleadings. (T. p. 58).
7. Defendants' Motion to Amend Answer. (T. pp. 64-70).
8. The complete record of all proceedings and evidence at the trial. (T. pp. 75, 105-161).
9. Order of Transmission of Original Exhibits. (T. p. 165).
10. Defendants' Proposed Findings of Fact and Conclusions of Law. (T. pp. 83-90).
11. Opinion of the Court. (T. pp. 92-93).
12. Findings of Fact and Conclusions of Law by the Court. (T. pp. 77-81).

13. The Judgment. (T. pp. 95-96).
14. Notice of Appeal filed by Appellants and Defendants, R. E. Lee and Standard Accident Insurance Company. (T. p. 98).
15. Designation of Contents of Record on Appeal. (T. p. 163).
16. Clerk's Certificate to Transcript of Record on Appeal. (T. p. 166).
17. Designation of Contents of Record on Appeal under Rule 19 (C.C.A.).
18. Statement of Points on Appeal under Rule 19 (C.C.A.).

Dated this 22nd day of October, 1942.

CORETTE & CORETTE

By KENDRICK SMITH

619 Hennessy Building

Butte, Montana

Attorneys for Defendants  
and Appellants.

Service of the foregoing Statement of Points on Appeal and Designation of Contents of Record on Appeal, Subdivision 6 of Rule 19 (C.C.A.) acknowledged and a copy thereof received this 23 day of October, 1942.

R. LEWIS BROWN

Asst. U. S. Atty.,

Attorney for Plaintiff  
and Appellee.

[Endorsed]: Filed Oct. 26, 1942.



11

**In the United States  
Circuit Court of Appeals  
For the Ninth Circuit**

---

R. E. LEE and STANDARD ACCIDENT AND  
INSURANCE COMPANY, a corporation,  
Appellants,  
vs.

UNITED STATES OF AMERICA,  
Appellee.

---

**BRIEF OF APPELLANTS**

---

UPON APPEAL FROM THE DISTRICT COURT  
OF THE UNITED STATES FOR THE DIS-  
TRICT OF MONTANA.

---

**FILED**

DEC 21 1942

PAUL P. O'BRIEN,  
CLERK

CORETTE & CORETTE,  
JOHN E. CORETTE, JR.,  
KENDRICK SMITH,  
619 Hennessy Bldg.,  
Butte, Montana,

Attorneys for Defendants  
and Appellants.

---

# SUBJECT MATTER INDEX

	Page
Statement of Jurisdiction .....	5
Statement of the Case .....	6
Specifications of Error .....	15
Summary of Argument .....	21
Argument .....	23
Under paragraph numbered "8" of the lease, making the lease subject to the regulations of the Secretary of the Interior, and under regulation 27, then in effect providing that a lease "will be cancelled by the Secretary of the Interior for good cause upon application," good cause for cancellation was shown and given by the lessee to the Secretary of the Interior .....	23
The Government's own investigation file showed that there was good cause for surrender of the lease and it contained no facts upon which a refusal to consent to the application for surrender and cancellation could be based .....	30
The Government has utterly failed to prove the material allegations of its complaint "that the said R. E. Lee failed, refused and neglected to show cause" .....	32
Under paragraph numbered "7" of the lease, providing that "the lessee may, with the consent of the Secretary of the Interior, surrender this lease," lessee applied to the Secretary of the Interior for such consent and the Secretary was required to give his "consent" because good cause had been shown under regulation 27 and because there was no fact or circumstance upon which a reasonable person could have refused "consent" .....	34
A. Section 7 of the lease must be construed to have been inserted for a purpose and must be given a reasonable interpretation .....	35
B. Lessee was required only to render a performance which would be satisfactory to a reasonable man .....	36
As an executive officer the Secretary of the Interior is not permitted to act arbitrarily and he acted arbitrarily in refusing the applications of the lessee for surrender and cancellation .....	38
Secretary's Action Entirely Unsupported by Evidence ....	41
Under an implied provision of the lease the lessee was excused from further performance because of the absolute futility of drilling further wells and because the presence of oil and gas was proved not to exist, this being the subject matter of the lease contract.....	42
Conclusion .....	47



# INDEX OF CITATIONS

Page

## CASES:

Adamson vs. Alexander Milburn Co., (C.C.A. 2) 275 Fed. 148, 157 .....	37
Aniker v. Gunsburg, 246 U. S. 110, 38 S. Ct. 228, 62 L. ed. 603 .....	39
Bishop v. Bloomington Canning Co., 307 Ill. 179, 138 N. E. 597, 598 .....	38
Fidelity & Deposit Co. of Maryland v. Jones, 256 Ky. 181, 75 S. W. (2d) 1057 .....	47
Garrison vs. U. S., 7 Wall. (U. S.) 688, 19 L. ed. 277.....	36
Gibson vs. Oliver, 158 Pac. 277, 27 Atl. 961 .....	47
Gould vs. McCormick, 75 Wash. 61, 134 Pac. 676 .....	38
Hallam vs. Commerce Mining & Royalty Co., (C.C.A. 10) 49 F. (2d) 103, 109 .....	40
Mineral Park Land Company vs. Howard, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916 F., 1.....	43
Moran vs. Prather, 23 Wall. (U. S.) 492, 23 L. ed. 121.....	36
Rice vs. Ege (C. C. N. Y.) 42 Fed. 661 .....	44
Shepherd vs. Union Central Life Ins. Co., (C.C.A. 5) 74 F. (2d) 180 .....	37
Swiss Oil Corporation vs. Riggsby, 252 Ky. 374, 67 S. W. (2d) 30 .....	43, 44, 46
Tucker vs. Canfield (C.C.A. 8) 276 Fed. 385 .....	44
Waldorf System vs. M. McDonough Co., (C.C.A. 1) 93 F. (2d) 363 .....	35
Ward vs. Daugherty, 228 Ky. 326, 14 S. W. (2d) 1089, 1090....	46
Williams vs. United States, 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026 .....	39
Woodworth vs. McLean, 97 Mo. 325, 11 S. W. 43 .....	47

# INDEX (Continued)

Page

## REGULATIONS:

Regulation 27, Department of Interior, Regulations Governing Leasing of Tribal Lands for Mining Purposes, Approved July 23, 1924.....	9, 10, 11, 14, 15, 16, 21, 22, 23, 24, 25, 27, 34, 38
---	--

## STATUTES:

28 U. S. Code, sec. 41 .....	5
28 U. S. Code, sec. 225, Judicial Code, sec. 128 .....	5

## TEXTBOOKS:

(Note) 12 A. L. R. 1273, 1287 .....	43
Restatement of the Law of Contracts, sec. 461 .....	43
Restatement of the Law of Contracts, sec. 265 .....	38
6 Summers, Oil and Gas, p. 316 .....	25
1 Thornton, Oil and Gas (Willis) sec. 101a .....	36
1 Thornton, Oil and Gas (Willis) sec. 156 .....	44
1 Thornton, Oil and Gas (Willis) sec. 200 .....	44

NO. 10293

**In the United States  
Circuit Court of Appeals  
For the Ninth Circuit**

---

R. E. LEE and STANDARD ACCIDENT AND  
INSURANCE COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

**BRIEF OF APPELLANTS**

---

**STATEMENT OF JURISDICTION**

This is a civil action at law brought by the United States to collect for the alleged breach of one of the conditions of a written lease of lands owned by the United States. The Complaint alleged that the District Court had "jurisdiction hereof by reason of the provisions of section 41 of Title 28, U. S. Code". (R. 2). Appellants agree. The appeal here is from a final money judgment. (R. 77). This is a final decision and review is allowed under the provisions of section 225 of Title 28 U. S. Code, being Judicial Code Section 128 as amended.

## STATEMENT OF THE CASE

This case involves the question of whether the defendant Lee surrendered an oil and gas lease in accordance with the provisions of sections 7 and 8 of the lease and section 27 of the regulations and was thereby relieved of any further obligation, or whether the Secretary of the Interior without *any facts* to support his action could refuse to accept the surrender, declare the lessee in default and collect the amount of the bond.

Suit was brought by the United States to collect \$6000 together with interest at 6 per cent per annum from February 3, 1938, for an alleged breach of one of the requirements of a written lease. The individual defendant was the lessee; the corporate defendant being the surety on the bond for performance of the obligations of the lease. The complaint sets forth the lease (R. 9) and the bond (R. 21).

The Complaint alleged that on September 26, 1935, the Superintendent of the Blackfeet Indian Reservation in Montana leased to R. E. Lee certain lands within the reservation and that the lands were owned by the United States and held by it for its Indian wards (R. 3, 4). The lease was an oil and gas lease covering 470 acres (R. 9, 10). Before the lease became effective the lessee had to furnish "a satisfactory bond as required by the regulations." (R. 4). The lease and bond were approved on January 24, 1936 by the Secretary of the Interior and the lease thereupon became effective. (R. 4, 5).

Paragraph numbered 4 of the lease required the

drilling of four wells within the first year and specified that failure to drill such wells would be a violation of a substantial term and condition of the lease and would require payment of the bond (R. 13-15). The Complaint alleged that four wells were not drilled within the first year (R. 6); that paragraph 10 of the lease permitted forfeiture of the lease for a violation of its terms upon thirty days' written notice (R. 18); and that the Secretary of the Interior on February 3, 1938, gave thirty days' demand for the payment of the bond which was not paid. (R. 8).

By answer the defendants admitted the existence and validity of the lease and bond and that Lee, the lessee, did not drill four wells upon the leased premises within one year, but denied that the lease was in full force and effect for the full period of one year and denied that there was any obligation on the part of the lessee to do anything more than to surrender the lease after the drilling on the leased premises and on other premises in the same vicinity indicated that oil or gas could not be produced upon the leased premises. (R. 26-40).

The defendants's third defense was an affirmative defense. Therein it was alleged that within a short time after the lease became effective Lee entered the premises and drilled to completion one well in June of 1936; that this well was not only drilled through the ordinary producing structures but at the request of the United States was drilled to a depth of 100 feet in the Madison limestone, although sulphur water was encountered on entering the Madison limestone,

which indicated that the land would not produce oil or gas in commercial quantities; that the well was drilled at a total cost of approximately \$25,000 and to a depth of 3,238 feet and that all of the operations were carried on under the supervision of the United States Geological Survey (R. 30, 31). The defense also alleged that prior to the completion of the well drilled by Lee on the leased premises five other wells were drilled in the immediate vicinity and that these wells were all dry holes and failed to produce oil or gas in commercial quantities and were abandoned; that the six wells were drilled over a structural range covering all of the lands included in the lease and that the geological information obtained from the drilling of the six wells indicated that oil and gas could not be produced from the lands covered by the lease and that the drilling of further wells would be uneconomical, wasteful and would not produce oil or gas. (R. 31, 32). It is also alleged that Lee had a study made by independent geologists of the probabilities of obtaining production of oil or gas from the leased lands and was informed that there was no reasonable probability of obtaining production of oil or gas and that there was no justification or reason for the drilling of additional wells. (R. 32) Further it was alleged that Lee thereupon, and while the lease was in full force and effect and at a time when he had complied with all the obligations of the lease, took advantage of the provisions of paragraph 7 of the lease and executed and filed with the Secretary of the Interior an application for consent to the sur-



render of the lease and did everything necessary to surrender the lease and to obtain the consent of the Secretary to the surrender and did thereby surrender the lease and relieve himself and his surety company of any further obligation under the lease and under the bond; (R. 32-34) and that the Secretary of the Interior, without having *any facts* of any kind or character upon which to support his action, refused to consent to the surrender (R. 34) and that the action of the Secretary of the Interior was arbitrary, unreasonable and without any facts upon which to base such action, and that the Secretary's action was an abuse of discretion and was contrary to law. (R. 35) It was then alleged that the lease was surrendered in accordance with the provisions of paragraph 7 of the lease and that defendants were relieved of all obligations under the bond. (R. 36)

Thereafter the United States made a motion for judgment on the pleadings (R. 41-43) and defendants filed a cross motion for judgment on the pleadings. (R. 43, 44) The court denied both motions. (R. 45-46)

The defendants made a motion to amend their answer (R. 46-56) to set forth the provisions of paragraph 8 of the lease providing that the lease

“shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease.” (R. 47).

The Motion to Amend further set forth paragraph numbered 27 of the regulations in effect at the time

the lease was made, which regulations were approved by the Secretary of the Interior on July 23, 1924, and which regulation numbered 27 provided in part that:

“A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee.” (R. 47).

The Motion alleged that there was full compliance by the lessee with paragraph 27 of the regulations in making application for cancellation. (R. 48, 49, 50-56).

The case was tried to the court without a jury. (R. 80). At the trial there was no conflicting evidence of any kind. The United States contented itself with introducing in evidence it Exhibit No. I, being a letter to an attorney for R. E. Lee, asking for payment of the bond within thirty days (R. 81-83). Thereupon the Government rested. (R. 83).

Thereupon the Defendants proved by uncontradicted evidence:

- (a) That lessee paid a bonus of \$805.00 to the Government in securing the lease. (R. 90-92).
- (b) That one well was drilled upon the leased premises and at a cost of approximately \$25,000.00, of which sum \$8,000.00 was spent to comply with the terms of the lease after it was known that a commercial well could not be obtained (R. 106) and that the well was properly abandoned. (R. 97-102).
- (c) That on an immediately adjacent lease the same lessee participated in the drilling of a well which disproved commercial production on the leased premises. (R. 109).

- (d) That both these wells were dry wells. (R. 109).
- (e) That three other wells in the vicinity were dry wells and that all of the five wells were drilled over a structural range covering the entire lease. (R. 107).
- (f) That geologically there was no chance of getting any commercial production upon the property in this lease. (R. 108).
- (g) That before making application for surrender and cancellation of the lease Lee, the lessee, secured the services of Mr. J. E. Hupp, a geologist who made a study and report on the probabilities of producing oil and gas on the premises and his report showed that geologically there was no chance of getting production. (R. 117-118).
- (h) That paragraph 8 of the lease provided that it

“shall be subject to the regulations of the Secretary of the Interior now or hereafter enforced relative to such leases”.

That regulation 27 of the regulations thereby referred to specified in part:

“A lease will be cancelled for good cause upon application of the lessor or lessee.” (R. 95).

That paragraph 7 of the lease provided that:

“The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part.”

- (i) That application was made by the lessee for surrender and cancellation of the lease on December 4, 1936, and before any default of any kind or character had occurred. Lee, the lessee, addressed a letter to the Secretary of the Interior, delivered the same to Mr. Duncan of the United States Geological

Survey and thereby requested a cancellation of the lease and showed good cause for such cancellation. (R. 84-86, 115).

- (j) That a district Supervisor of the Geological Survey, Mr. H. J. Duncan, stated officially in a letter dated December 19, 1936, to the Superintendent of Blackfeet Indian Agency that he recommended the request of R. E. Lee for cancellation and wrote:

"I cannot justify any requirement for the additional three wells in view of the dry hole drilled on the lease and the dry hole drilled in the SW-NE section 26, T. 33 N., R. 6 W. It is therefore recommended that the request for cancellation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe." (R. 87-89).

- (k) That the Director and the local Field Officer of the Geological Survey were "of the opinion that the lands included in both the Tribal and allotted lease have been adequately tested", and that such opinion was reported to the Secretary of the Interior. (R. 112).

- (l) That thereafter Lee, the lessee, received a letter dated July 9, 1937 (Exhibit "C" to the complaint, R. 24-26) from William Zimmerman, Assistant Commissioner of Indian Affairs in the Department of the Interior, acknowledging prior consideration of the application for cancellation and allowing

"thirty days from date of this letter within which to show cause"

why the lease should not be cancelled and the bond paid. In response to this letter Lee delivered to the Secretary of the Interior a statement reiterating again all of the good causes for an application for surrender. (Defendants' Exhibit No. 10, R. 104-110).

- (m) That J. E. Hupp was a qualified geologist, was present in the Cut Bank field when practically all the first 150 wells were drilled and studied these wells (R. 119-121) and that he had studied the results of any well of any consequence that had been drilled in the Cut Bank field; (R. 121) that on the leased premises he was the geologist on the well which was drilled and in the summer and fall of 1936 made a geological study and report for R. E. Lee and in November of 1936 aided by Mr. Lee in the preparation of Defendants' Exhibit No. 2, a letter dated December 4, 1936, to the Secretary of the Interior, and that at that time advised Mr. Lee that he thought there was no chance for him to find oil in commercial quantities. (R. 122, 123); that the statements contained in Defendants' Exhibit No. 10 were within his knowledge at the time the instrument was prepared and that they were true, this being the subsequent letter to the Secretary of the Interior. (R. 123-124). Mr. Hupp further testified as to a map prepared by him and showing the location of 12 dry holes that were drilled in the area of the leased premises. (R. 125).

At the end of the defendants' case the Government offered no rebuttal. (R. 142).

The defendants thereupon made a motion for judgment specifying the grounds therefor. (R. 142-145). Thereafter the defendants proposed findings of fact and conclusions of law. (R. 64-74). The court rendered its opinion in favor of the United States, (R. 74-76) adopted plaintiff's proposed findings of fact and conclusions of law (R. 58-64) and judgment was entered in accordance therewith. (R. 77-79). This



appeal followed.

The essential question involved is whether the court in view of the uncontradicted evidence should have dismissed the case or rendered judgment for and on behalf of the defendants. This question was raised by the defendants' motion for dismissal and judgment at the close of all the evidence, (R. 142-145) and was renewed in the defendants' proposed findings of fact and conclusions of law. (R. 64-74).

The question is primarily one of law; that is:

- 1st. Whether a lessee can surrender a lease of this kind under sections 7 and 8 of the lease and section 27 of the regulations, when all of the facts which he presents and all of the facts ascertained by the Government in its investigation show good cause for the surrender;
- 2nd. Whether the Secretary of the Interior, without any single fact upon which to base his decision, can refuse to accept the surrender of the lease and declare the lessee in default, even though there was no default at the time of the attempted surrender;
- 3rd. Whether the lessee is entitled to rely upon and act upon section 7 of the lease, which gives him the right to surrender, with the consent of the Secretary, and section 8 of the lease and section 27 of the regulations which specify that "*a lease will be cancelled by the Secretary for good cause*".
- 4th. Whether the Secretary of the Interior may as an administrative officer act arbitrarily and in such manner as no reasonable man could have done;
- 5th. Whether the lessee was excused from further performance, under an implied provi-



sion of the lease, because of the absolute futility of drilling further wells and because the presence of oil and gas was proved not to exist, this being the subject matter of the contract; or

- 6th. Whether in disregard of all these points and questions the Secretary of the Interior has under this lease and its circumstances the unlimited, untrammelled and unfettered power to require payment of the bond for not drilling the four wells, even though all of the facts presented by the lessee and by the Government's representatives support the application for consent to the surrender of the lease, which was made prior to any default by lessee.

### SPECIFICATIONS OF ERROR

Appellants and Defendants hereby make the following Specifications of Errors.

#### I.

The Court erred in refusing and denying Defendants' Motion for Judgment made at the time of trial for the "Fourth" ground stated therein as follows:

"Fourth, That Lee, at a time when the lease was in good standing, surrendered the lease and applied to the Secretary of the Interior for consent to surrender in the manner provided in paragraph 7 of the lease and Article 27 of the Regulations, and did all things necessary to obtain the Secretary's consent to surrender, and complied with every requirement of paragraph 7 of the lease, Article 27 of the regulations, and the entire lease." (R. 143).

#### II.

The Court erred in refusing and denying Defendants' Motion for Judgment made at the time of trial

for the "Fifth" ground as stated therein as follows:

"Fifth, That Regulation 27 provides that a lease will be canceled by the Secretary of the Interior for good cause upon application of the lessee, and that Lee presented good cause to the Secretary of the Interior for cancelation, and for consent to surrender, for which he had applied, by showing that the area had been tested and proven non-productive, and by showing that there was no reasonable probability of obtaining production from the area included in the lease; and by showing that further drilling on the land involved would be useless and an economic waste and not justified; and by showing that he had complied with all of the provisions of the lease with which he had to comply up to the time that he surrendered the lease and applied to the Secretary of the Interior for consent to that surrender; and by showing that he had done everything necessary and taken all steps necessary to surrender the lease, and to obtain the Secretary of the Interior's consent to surrender." (R. 144).

### III.

The Court erred in refusing and denying Defendants' Motion for Judgment made at the time of trial for the "Sixth" ground stated therein as follows:

"Sixth, That there were no facts to justify the Secretary of the Interior's refusal to consent to the surrender of the lease by Lee." (R. 144).

### IV.

The court erred in refusing and denying defendants' motion for judgment made at the time of trial for the "Seventh" ground stated therein as follows:

"Seventh, That the Secretary of the Interior's refusal to consent to the surrender was arbitrary, unreasonable, unsupported by any facts, contrary to law." (R. 144).

V.

The court erred in refusing and denying defendants' motion for judgment made at the time of trial for the "Eighth" ground stated therein as follows:

"Eighth, That there is no evidence of any damage to the plaintiff or anyone else in this case, and there is no basis for the plaintiff's claim for \$6,000, and the plaintiff is attempting to enforce a penalty which is unreasonable, illegal, and contrary to law." (R. 144-145).

VI.

The court erred in rendering its opinion in favor of the United States of America, appellee and plaintiff. (R. 74-76).

VII.

The evidence was insufficient to justify the judgment against defendants and appellants or either of them, and the judgment was contrary to the evidence and contrary to law. (R. 77, 80-145).

VIII.

The court erred in making its finding of fact numbered VI that Lee wrongfully failed, refused and neglected to drill the four wells, because the evidence was insufficient to justify such finding and it was clearly erroneous and was an erroneous determination of a mixed question of law and fact. (R. 61-62, 80-145).

IX.

The court erred in making its finding of fact numbered VII that Lee breached the lease by failing to drill four wells within one year, because the evidence was insufficient to justify such finding and it was

clearly erroneous and was an erroneous determination of a mixed question of law and fact. (R. 62, 80-145).

### X.

The court erred in making its finding of fact numbered X that generally all facts in issue were found in favor of the plaintiff and against the defendants and that plaintiff had sustained the material allegations of the complaint by competent proof, because the evidence was insufficient to justify such finding and it was clearly erroneous and was an erroneous determination of a mixed question of law and fact. (R. 63, 80-145).

### XI.

The court erred in making its conclusion of law numbered II that Lee breached the lease and the Secretary of the Interior acted lawfully in terminating the same and the defendants became liable on the bond, because the evidence was insufficient to justify such conclusion and it was contrary to and against the clear weight of the evidence and was clearly erroneous. (R. 63-64)

### XII.

That the court erred in making its conclusion of law numbered III that plaintiff was entitled to judgment, because the evidence was insufficient to justify such conclusion and it was contrary to and against the clear weight of the evidence and was clearly erroneous. (R. 64).

### XIII.

There was credible uncontradicted evidence to sup-

port, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered VI and the court was in error in refusing to adopt said proposed finding of fact. (R. 70, 80-145).

XIV.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered VII and the court was in error in refusing to adopt said proposed finding of fact. (R. 70, 72, 80-145).

XV.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered VIII and the court was in error in refusing to adopt said proposed finding of fact. (R. 72, 80-145).

XVI.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered IX and the court was in error in refusing to adopt said proposed finding of fact. (R. 72, 80-145).

XVII.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered X and the court was in error in refusing to adopt said proposed finding of fact. (R. 72, 80-145).

XVIII.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, de-

fendants' proposed finding of fact numbered XI and the court was in error in refusing to adopt said proposed finding of fact. (R. 72, 80-145).

XIX.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered XII and the court was in error in refusing to adopt said proposed finding of fact. (R. 72-73, 80-145).

XX.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered XIII and the court was in error in refusing to adopt said proposed finding of fact. (R. 73, 80-145).

XXI.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered XIV and the court was in error in refusing to adopt said proposed finding of fact. (R. 73, 80-145).

XXII.

The court erred in refusing to adopt defendants' proposed conclusion of law numbered II. (R. 73-74).

XXIII.

The court erred in refusing to adopt defendants' proposed conclusion of law numbered III. (R. 74).

XXIV.

The court erred in refusing to adopt defendants' proposed conclusion of law numbered IV. (R. 74).



## XXV.

The court erred in refusing to adopt defendants' proposed conclusion of law numbered V. (R. 75).

### SUMMARY OF ARGUMENT

#### I.

Under paragraph numbered "8" of the lease, making the lease subject to the regulations of the Secretary of the Interior, and under regulation 27, then in effect, providing that a lease "will be cancelled by the Secretary of the Interior for good cause upon application," good cause for cancellation was shown and given by the lessee to the Secretary of the Interior. The showing, supported by uncontradicted evidence, was that, —

- (a) The area had been adequately tested and proven non-productive;
- (b) There was no reasonable probability of obtaining production from the area;
- (c) Further drilling would be useless, and an unjustified economic waste; and
- (d) Lessee had done everything required to comply with the provisions of the lease and the provisions for cancellation and surrender.

Good cause being shown, the Secretary of the Interior was required to accept the application.

#### II.

The Government's own investigation file showed that there was good cause for surrender of the lease and it contained no facts upon which a refusal to consent to surrender could be based.

#### III.

The Government has utterly failed to prove the

material allegations of its complaint "that the said R. E. Lee failed, refused and neglected to show cause."

#### IV.

Under paragraph numbered 7 of the lease providing that "the lessee may, with the consent of the Secretary of the Interior, surrender this lease" the lessee surrendered the lease and applied to the Secretary of the Interior for such consent and the Secretary was required to give his "consent" because:

- (1) Regulation 27, which was made a part of the lease by section 8 thereof provided that a lease "will be cancelled by the Secretary of the Interior for good cause, upon application";
- (2) Good cause was shown both by the lessee and by the Government's own representatives;
- (3) Not a single fact appeared from lessee's presentation or from the Government's own investigation to justify or support the Secretary's refusal to accept lessee's application for surrender and cancellation;
- (4) There was no fact or circumstance upon which a reasonable man could have refused consent;
- (5) Section 7 of the lease must be construed to have been inserted for a purpose, must be given a reasonable interpretation and must be considered in the light of section 8 of the lease and section 27 of the regulations;
- (6) The lessee was required only to render a performance which would be satisfactory to a reasonable man.

#### V.

As an executive officer the Secretary of the In-

terior is not permitted to act arbitrarily and he acted arbitrarily in refusing the applications of the lessee for surrender and cancellation of the lease.

## VI.

The Secretary's action in refusing to accept lessee's application for surrender and cancellation was *entirely* unsupported by evidence.

## VII.

Under an implied provision of the lease the lessee was excused from further performance because of the absolute futility of drilling further wells and because the presence of oil and gas was proved not to exist, this being the subject matter of the lease contract.

## ARGUMENT

### I.

UNDER PARAGRAPH NUMBERED "8" OF THE LEASE, MAKING THE LEASE SUBJECT TO THE REGULATIONS OF THE SECRETARY OF THE INTERIOR, AND UNDER REGULATION 27, THEN IN EFFECT, PROVIDING THAT A LEASE "WILL BE CANCELLED BY THE SECRETARY OF THE INTERIOR FOR GOOD CAUSE UPON APPLICATION," GOOD CAUSE FOR CANCELLATION WAS SHOWN AND GIVEN BY THE LESSEE TO THE SECRETARY OF THE INTERIOR.

The showing, supported by uncontradicted evidence, was that, —

- (a) The area had been adequately tested and proven non-productive;
- (b) There was no reasonable probability of obtaining production from the area;

- (c) Further drilling would be useless, and an unjustified economic waste; and
- (d) Lessee had done everything required to comply with the provisions of the lease and the provisions for cancellation and surrender.

Good cause being shown and there not being a single fact to justify any other action, the Secretary of the Interior was required to accept the application.

By proposed amendments (R. 46) to the answer, by an understanding between counsel in open court (R. 56) and by proof at the trial (R. 94-5), appellants called the court's attention to regulation 27 of the regulations governing the leasing of Tribal lands for mining purposes, approved by the Secretary of the Interior, on July 23, 1924, and in effect during all the period involved in this case. This regulation 27 provides:

“A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and recorded release of record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay advance royalties and rentals in lieu of development annually when due by reason of any subsequent surrender or

cancellation of the lease. Upon cancellation of a lease the lessor shall be entitled to take immediate possession of the land.” (R. 95-96). See this regulation also in 6 Summers, Oil and Gas, p. 316.

Paragraph “8” of the lease provides:

“8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties.” (R. 17).

Clearly regulation 27 was a part of and a condition of the lease.

An application for cancellation (Defendants’ Exhibit 2) was addressed to the Secretary of the Interior on December 4, 1936, by the lessee (R. 84-86, 115). It pointed out that one well on the leased land was completed as a dry hole and that other developments on adjoining lands had resulted in dry holes. This was the original application for cancellation of the lease. Thereafter, and on July 9, 1937, the lessee was advised that consideration “has been given to your application for cancellation” and “you will be allowed thirty days from the date of this letter within which to *show cause*” (italics supplied) why the lease should not be cancelled and the bond amount paid. (Exhibit “C” to the complaint, R. 24-26). The original application showed facts sufficient to constitute good cause for cancellation and it clearly appears from the letter of July 9, 1937, that considera-



tion was still being given to this application. In response to this letter the lessee again made a showing of good and sufficient cause by a further letter to the Secretary of the Interior. (Defendants' Exhibit 10, R. 104-110).

The good cause shown by the original application for cancellation, and reiterated again at the Government's request, and the true facts as shown by uncontradicted evidence were that:

- A. The area had been adequately tested and proven to be non-productive:

Every effort was made to develop a commercial well out of the one drilled on the leased premises. Approximately \$8,000 was spent on the well to comply with the terms of the lease after it was known that a commercial well could not be obtained. Prior thereto twelve wells had been drilled to the Madison limestone and none of them found oil and all found sulphur water. On an adjacent allotted lease, the same lessee drilled into Madison limestone and it was a dry well. Subsequent to drilling these two wells three other wells to the South and South and East of the leased lands were dry wells and abandoned. These wells were drilled over a structural range covering the entire premises, and proved that the land covered by the lease did not contain oil or gas.

- B. There was no reasonable probability of obtaining production from the area:

This was the opinion of a competent geologist acquainted with the field and these premises and was supported by the dry wells drilled over the structural range.

- C. Further drilling would be useless and an unjustified economic waste.

This is apparent from the above-recited facts.



D. Lessee did everything required to comply with the provisions of the lease and the provisions for cancellation and surrender:

The well drilled on the leased premises cost \$25,000, of which sum \$8,000 was spent to comply with the terms of the lease after it was known that a commercial well could not be obtained. The well was abandoned according to regulations and under the direction of the United States Geological Survey. (Defendants' Exhibits 8 and 9, R. 97-102). Bonus payments in the amount of \$805.00 had been paid. (Defendants' Exhibits 4 and 5, R. 90-92). The cancellation fee of \$1.00 was paid. (Defendants' Exhibit 6, R. 93-94). Lessee surrendered the lease and abandoned the property. (R. 118). The lease had never been recorded. (R. 119).

Defendants' application for surrender (Defendants' Exhibit 2, R. 84-86) was filed in the office of the Geological Survey at Casper and was transmitted by H. J. Duncan, Supervisor of the district office in Casper, Wyoming, of United States Department of the Interior Geological Survey, to the Superintendent of the Blackfeet Indian Agency. The letter of transmittal (Defendants' Exhibit 3, R. 87-88) stated:

“ \* \* \* I cannot justify any requirements for the additional three wells in view of the dry hole drilled on the lease, and the dry hole drilled in the SW NE Section 26, T. 33 N., R. 6 W.

“It is therefore recommended that the request for cancellation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe. Will you kindly advise this office the date of cancellation, in order to clear our records? Form 9-614 and a check for \$1.00 are attached hereto.”

This information was in the hands of the Secretary of the Interior on July 7, 1937, when he gave a fur-

ther period of time within which "to show cause". At that very time then the Secretary had "good cause" for accepting the request for cancellation, the good cause being furnished by a scientific branch of his own department together with a recommendation of acceptance of the requested cancellation. Moreover, the Secretary knew that the opinion of the local field officer of the Geological Survey was supported by the Director of the Geological Survey. In a letter from the Assistant Commissioner of Indian Affairs to the Secretary of the Interior, dated November 17, 1937, it is recited in part:

"As stated in Office letter of May 29, the Director and the local field officer of the Geological Survey are of the opinion that the lands included in both the tribal and the allotted lease have been adequately tested." (Defendants' Exhibit 10, R. 112).

In other words, there was no fact contrary to the good cause shown by the lessee. No fact or circumstance was before the Secretary of the Interior which did not demand acceptance of the request for cancellation. True the Blackfeet Tribal Council wanted the bond forfeited "for failure to comply with drilling requirements", (R. 112), but that is the very matter in question, i. e. whether there was a showing of "good cause" which would operate to require the Secretary to cancel the lease, relieve the lessee from further drilling and release the bond. It has been the position of the United States during the entire case that it lay within the power of the Secretary of the Interior to act as he saw fit. This

is borne out by the plaintiff's motion for judgment on the pleadings, (R. 41) by the limited nature of its proof and the failure to offer any evidence in rebuttal and by the nature of its proposed findings of fact and conclusions of law. (R. 58-64).

By the clear terms of paragraph "8" of the lease, regulation 27 was "a part of and condition" of this lease. Moreover, the Assistant Commissioner of Indian Affairs seems to have been guided thereby in his letters giving time "to show cause".

There was no justification for not giving heed to the "good cause" shown. The Geological Survey could not "justify any requirement for the additional three wells". (R. 88). The Secretary of the Interior denied the application without any basis in fact or in reason upon which to justify his refusal; he clearly violated and disregarded the plain language of his own regulation.

We believe the term "good cause" needs no interpretation in this case where it seems impossible to have shown any better cause and where there were no facts or circumstances other than those shown by the lessee and the Geological Survey.

The language of the regulation is "will be cancelled by the Secretary of the Interior for good cause". In that wording no basis exists for the exercise of administrative discretion when there are no facts except those showing good cause. The "good cause" was clearly shown. It must be accepted. The Secretary cannot excuse his rejection of the showing. Certainly he cannot now demand payment of the

bond when he has clearly violated the terms of a condition subsequent which permits a cancellation of the lease. Certainly he cannot flagrantly violate his own rules and play the game according to extemporaneous catch as catch-can rules made solely by himself. He even disregarded the Geological Survey as a referee.

Clearly in this case the lessee acted in good faith and assigned good cause for the application to cancel.

This oil and gas lease must be considered as cancelled upon application made by, and for good cause shown by, the lessee acting in good faith at a time when he had fully complied with every obligation of the lease and of the regulations.

## II.

THE GOVERNMENT'S OWN INVESTIGATION FILE SHOWED THAT THERE WAS GOOD CAUSE FOR SURRENDER OF THE LEASE AND IT CONTAINED NO FACTS UPON WHICH A REFUSAL TO CONSENT TO THE APPLICATION FOR SURRENDER AND CANCELLATION COULD BE BASED:

From the Government's own files defendants secured their exhibit number 3. (R. 87-88). This was the letter from H. J. Duncan, Supervisor of the United States Geological Survey at its district office in Casper, Wyoming. That office had charge of the territory which included the land involved in this case. (R. 89). By that letter Mr. Duncan advised that he could not

“justify any requirement for the additional three wells in view of the dry hole drilled on the lease,

and the dry hole drilled in the SW NE Section 26, T. 33 N., R. 6 W.”

He thereupon and therefore

“recommended that the request for cancellation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe.”

From the Government's own files came defendants' exhibit 11. (R. 111-114). This was a letter dated November 17, 1937 and addressed to the Secretary of the Interior by William Zimmerman, Jr., Assistant Commissioner of Indian Affairs. Therein it appears that a prior recommendation had been made in May of 1937 that the Secretary cancel the lease at the request of the lessee and

“that he be relieved of liability under a bond given to secure performance of the lease.”

Again referring to the office letter of May, 1937, it was pointed out that:

“The director and the local field officer of the Geological Survey are of the opinion that the lands included in both the tribal and the allotted lease have been adequately tested.”

It is thus apparent that the Government's own files included the facts of good cause for the lessee's request for cancellation and that this good cause had been furnished by the recommendations of the District Supervisor of the United States Geological Survey, by the Director of the United States Geological Survey and by the Assistant Commissioner of Indian Affairs. It is also apparent from Exhibit “C” attached to the complaint (R. 24-26) that the lessee's



original application for cancellation was being considered.

In contrast with this strong showing of good cause from its own files the Government made no effort of any kind or character to show that the Secretary of the Interior had any fact or circumstance before him to cause him to deny the application. This is consistent with the Government's position that the Secretary of the Interior had the completely unrestricted power to deny the requested cancellation.

Indeed it seems apparent that under the circumstances disclosed by its own files this is the only possible position which the Government could take. We submit that it is a very strange and striking anomaly for the Government to inform a lessee that he has an opportunity to show cause when it can be demonstrated from the Government's own files that it paid absolutely no attention to the good cause shown by its own investigating officers.

We urge that the good cause shown by the lessee was amply corroborated, verified and sustained by the findings and reports of officials within the Department of Interior and that such findings and reports were brought to the attention of the Secretary of the Interior not once but a number of times.

### III.

THE GOVERNMENT HAS UTTERLY FAILED TO PROVE THE MATERIAL ALLEGATIONS OF ITS COMPLAINT "THAT THE SAID R. E. LEE FAILED, REFUSED AND NEGLECTED TO SHOW CAUSE".

In paragraph XI of the complaint it is alleged that



on July 9, 1937, Lee was given "a notice in writing as required in said lease". (R. 6-7). Exhibit "C" attached to the complaint sets forth the letter to Mr. Lee of July 9, 1937 and specifies a time within which he was allowed "to show cause" why the lease should not be cancelled and the bond paid. Paragraph XII of the complaint alleged

"that the said R. E. Lee failed, refused and neglected to show cause, as required by said notice, within thirty days, or at all, why the said lease should not be cancelled."

The Government utterly failed to prove that Lee failed, refused and neglected to show cause as required by this notice. Indeed the uncontradicted evidence as shown by defendants' Exhibit 10 (R. 104-110) is that Lee did in fact respond to this notice and did again, as he had originally done, show good cause. Even more striking is the fact that the Government's own investigation file showed good cause from its own investigating officers for accepting the requested cancellation and showed that such investigating officers recommended that the lessee be relieved of liability under the bond.

It is abundantly clear, therefore, that the Government itself failed to prove the allegations of Lee's failure to show cause. The Government has admitted that the notice in writing given to Lee on July 9, 1937, was given "as provided in said lease". True enough the Government has, in paragraphs XI and XII of the complaint, alleged that at that time Lee was in default. We deny that such is true be-

cause of Lee's application for cancellation made December 4, 1936. (Defendants' Exhibit 2, R. 84-86). The Government's allegations as to failure to show cause were material, were not supported by any proof on behalf of the Government and were entirely refuted by uncontradicted evidence on behalf of the defendants and by uncontradicted evidence that came from the Government's own files.

We urge that under such circumstances there has been a material failure of proof on behalf of the Government and that the Government's case should be dismissed and judgment entered on behalf of the defendants.

#### IV.

“UNDER PARAGRAPH NUMBERED “7” OF THE LEASE, PROVIDING THAT “THE LESSEE MAY, WITH THE CONSENT OF THE SECRETARY OF THE INTERIOR, SURRENDER THIS LEASE,” LESSEE APPLIED TO THE SECRETARY OF THE INTERIOR FOR SUCH CONSENT AND THE SECRETARY WAS REQUIRED TO GIVE HIS “CONSENT” BECAUSE GOOD CAUSE HAD BEEN SHOWN UNDER REGULATION 27 AND BECAUSE THERE WAS NO FACT OR CIRCUMSTANCE UPON WHICH A REASONABLE PERSON COULD HAVE REFUSED “CONSENT”.

Under paragraph 7 of the lease it is provided that “the lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part.” Defendants proved that the lessee made application for such a surrender, showing all the facts

which we have discussed above in relation to good cause.

- A. *Section 7 of the lease must be construed to have been inserted for a purpose and must be given a reasonable interpretation.*

Appellee has heretofore urged that, where consent is required, the power to withhold consent is implied and cannot be the subject of compulsion. Ordinarily, this is a correct statement of an abstract principle of law. It fails in its application to this case. Without further facts appearing, consent is normally required to excuse a promisor from non-performance of his obligations under a contract. This is true where the contract makes no mention of consent. In such cases, however, performance may be excused because of other circumstances such as impossibility of performance or non-existence of the subject matter found to be an essential foundation of the obligation.

The insertion of the requirement to secure consent of the promisee for the surrender of a lease or the termination of a contract does not impose a greater obligation upon the promisor, but, rather, leads to the necessary and ordinary interpretation that the language of the contract must be given a construction as a whole which will afford to the contract a reasonable interpretation.

It is a primary rule of construction that a court must, if possible, ascertain and give effect to the mutual intent of the parties at the time a contract was made. *Waldorf System v. M. McDonough Co.*, (C.C.A. 1) 93 F. (2d) 363, cert. den. 303 U. S. 663.

Agreements must receive a reasonable interpretation. *Moran v. Prather*, 23 Wall. (U.S.) 492, 23 L. ed. 121. As a general rule, if there is doubtful language in a contract, it must be interpreted most strongly against the party who use it. *Garrison vs. U. S.*, 7 Wall. (U. S. 668, 19 L. ed. 277. A surrender clause in an oil and gas lease is for the benefit of the lessee. 1 *Thornton, Oil and Gas (Willis)*, Sec. 101a, p. 180. The surrender clause was introduced in oil leases to enable the lessee to be relieved of further performance after the land has proven to be non-productive. 1 *Thornton, Oil and Gas (Willis)*, Sec. 101a, p. 182. If he did not have such a right, he would find himself in a position where he would have to make wasteful, futile and useless expenditures drilling wells which would be of no benefit to anyone.

It would appear that there was no reason for the insertion of the provision for securing consent of the Secretary to a surrender if the plaintiff sought thereby to confer upon the Secretary the untrammelled, unrestricted, unabridged and arbitrary power to refuse consent. Rather, would it appear that the provision should be naturally interpreted to prevent the exercise of arbitrary dissatisfaction by the Secretary of Interior.

B. *Lessee was required only to render a performance which would be satisfactory to a reasonable man.*

We urge that, where one test well has been drilled upon a 470-acre tract covered by the lease and five test wells have been drilled in the immediate vicinity

and over the entire structural range and where there is no probability of the existence of oil or gas in the leased lands and where the Secretary has acted arbitrarily, unreasonably, contrary to the opinion of his own geological experts and without any facts upon which to base his action in refusing to give his consent to a surrender of the lease, then, and in that case, the lessee is excused from further performance under the lease, is excused from the requirement of drilling further wells and no recovery may be had upon the bond given in support of the lease.

Satisfaction of the promisee in a contract providing for a definite mechanical or financial or other result (other than a satisfaction of his whim, caprice, fancy, taste, sensibility or judgment) requires only a performance which reasonably ought to satisfy or should be satisfactory to a reasonable man. Dissatisfaction in such cases "is treated as unreal or fraudulent." *Shepherd vs. Union Central Life Ins. Co.*, (C.C.A. 5), 74 Fed. (2) 180, 181. In *Adamson vs. Alexander Milburn Co.*, (C.C.A. 2), 275 Fed. 148, 157, the court said:

"We think it also not improper to point out that where something is to be done to the 'satisfaction' of a particular person, and it is not simply a matter of personal taste, fancy, or caprice, to justify a rejection of the work and refusal to pay the rejection cannot be *arbitrary* or *unreasonable*. A simple allegation of dissatisfaction without a good reason is no defense." (*italics supplied*).

In doubtful cases courts are inclined to construe an agreement as requiring performance in such a way



as reasonably ought to satisfy the promisee. *Bishop vs. Bloomington Canning Co.*, 307 Ill. 179, 138 N.E. 597, 598. Ordinarily, a contract will be construed as not reposing in one of the parties the unqualified option or power to refuse performance. *Gould vs. McCormick*, 75 Wash. 61, 134 Pac. 676. *Restatement of the Law of Contracts*, sec. 265. Under this oil and gas lease we urge that the performance by the lessee was not designed for the purpose of suiting the esthetic taste or the arbitrary sensibilities or the capricious judgment of the Secretary of the Interior. This seems so obvious as not to require further belaboring of the point.

Paragraph 7 must be read and considered in connection with paragraph 8 and regulation 27. Considered jointly "consent" to surrender cannot be deemed an arbitrary prerogative of the Secretary. It must be deemed to require a performance or showing no greater than the rule invoked in "satisfaction" contracts which requires only a performance which ought reasonably to satisfy a reasonable man. The Secretary recognizes this by regulation 27 in which he says that if good cause is shown he *will* cancel a lease on application of either party.

## V.

AS AN EXECUTIVE OFFICER THE SECRETARY OF THE INTERIOR IS NOT PERMITTED TO ACT ARBITRAILY AND HE ACTED ARBITRAILY IN REFUSING THE APPLICATIONS OF THE LESSEE FOR SURRENDER AND CANCELLATION:

The Secretary of the Interior, an administrative



officer of the United States, was required to act reasonably upon the facts presented in the lessee's application. Good cause being shown for a surrender and cancellation, he could not act arbitrarily and contrary to the facts presented to him and known by him.

In *Aniker vs. Gunsburg*, 246 U. S. 110, 38 S. Ct. 228, 62 L. ed. 603, the question involved was whether the Secretary of Interior could act arbitrarily in approving or refusing to approve an oil and gas lease on Creek Indian lands. The court said that the Secretary, of course, had power under the statute to consider the advantages and disadvantages of the lease presented for his action and to exercise his judgment, but that he certainly could not act arbitrarily. The court's conclusion on this point was: (U. S. at p. 119).

"The statute is plain in its provisions—that no lease, of the character here in question, can be valid without the approval of the Secretary. Such approval rests in the exercise of his discretion; unquestionably this authority was given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. *It is also true that the law does not vest arbitrary authority in the Secretary of the Interior.*" (italics supplied).

In *Williams vs. United States*, 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026, the court considered the duty of the Secretary of the Interior to approve the acts of the State authorities of Nevada in selecting lands under a grant made by the Federal Govern-

ment. In discussing the authority of the Secretary, the court said: (U. S. at p. 524:)

“We would not be misunderstood in respect to this matter. *We do not mean to imply that any arbitrary discretion is vested in the Secretary;* but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force.” (italics supplied).

In a third case the Circuit Court of Appeals of the Tenth Circuit held that a determination of the Secretary of the Interior of the proper amount of royalty to be paid under a lease on allotted Indian lands was final “*in the absence of a showing of arbitrary action or fraud*”. *Hallam v. Commerce Mining & Royalty Co.*, (C.C.A. 10) 49 Fed. (2d) 103, 109, cert. den. 284 U. S. 643.

We urge that the Secretary of the Interior in considering a request for cancellation upon good cause shown and for consent to the surrender of an oil and gas lease could not act arbitrarily, unreasonably and without regard to the facts and cannot render a decision which has no factual foundation and which is contrary to all of the facts which are presented to him.

There are occasions in times of stress, especially in times of war, when the executive department may have occasion to act in an arbitrary manner. But in ordinary dealings with the public, in ordinary contractual relations, there is no occasion and no excuse for the attempted use and display of arbitrary

action. Moreover, when arbitrary action can be followed only by ignoring rules and regulations adopted as a safeguard therefrom, it is all the more apparent that this court must enforce the safeguard and protect the contractual rights of the private parties to the lease and bond. Rule 27 is the safeguard and as *all* of the facts show good cause for surrendering the lease the Secretary must have ignored the rules and the facts.

## VI.

### SECRETARY'S ACTION ENTIRELY UNSUPPORTED BY EVIDENCE.

The foregoing pages show that this is a very rare and unusual case, in which there are no facts presented, of any kind, to support or justify the Secretary's action. His own investigation corroborated the good cause presented by Lee. It did not produce any fact to justify his refusal of Lee's application for surrender and cancellation.

No question is presented of the right of the Secretary to decide, in accordance with his best judgment, where there are conflicting facts and where a refusal to accept the application for surrender and cancellation would be supported by substantial evidence.

The real issue is "Can the Secretary decide against a Lessee without regard for the facts and without having any Court review his decision?" The United States Attorneys in the argument before the Federal District Court met this question directly and contended that the Secretary has absolute power and discretion, regardless of the facts, that his decision

will be considered as having been his best judgment and is not and should not be reviewed by any Court.

We do not believe that the United States Constitution or system of Government ever contemplated that an administrative officer of the Executive Department could act arbitrarily and without regard to the facts presented and that the Courts of the United States would not review his action.

We do not expect ever again to see a case where all of Lessee's allegations and proof are confirmed and corroborated by all of the facts disclosed by the Government's own investigation.

If the Court will not review and reverse the action of the Secretary of the Interior in this case, it is impossible to contemplate any case in which the Court would review and reverse any action of any administrative officers of the United States Government.

## VII.

UNDER AN IMPLIED PROVISION OF THE LEASE THE LESSEE WAS EXCUSED FROM FURTHER PERFORMANCE BECAUSE OF THE ABSOLUTE FUTILITY OF DRILLING FURTHER WELLS AND BECAUSE THE PRESENCE OF OIL AND GAS WAS PROVED NOT TO EXIST, THIS BEING THE SUBJECT MATTER OF THE LEASE CONTRACT.

We urge that the continuation of a prospect of discovering oil or gas on the leased premises constituted the subject matter and essential foundation of the lease contract and that when this essential foundation is shown to have become non-existent subsequent to the formation of the contract, per-

formance is excused and the contract terminates by operation of law.

The principle that non-performance is excused where, without the fault of the promisor, performance becomes impossible by the cessation of the existence of a necessary thing or person, applies equally to cases where the event which renders the contract incapable of performance is the cessation or non-existence of a state of things going to the essence or essential foundation of the obligation. *Swiss Oil Corporation vs. Riggsby*, 252 Ky. 374, 67 S. W. (2) 30; *Mineral Park Land Company vs. Howard*, 172 Cal. 289, 156 Pac. 458, L.R.A. 1916 F. 1; *Restatement of the Law of Contracts*, sec. 461; (Note) 12 *A.L.R.* 1273 at 1287 (dealing with timber and mines). In *Swiss Oil Corporation vs. Riggsby*, 252 Ky. 374, 67 S.W. (2d) 30, the court stated (S.W. at p. 34):

“We cannot, therefore, agree with counsel for appellant that only the explicit letter of the contract must be regarded. The law recognizes that the continuation of the subject-matter of the contract is the essential foundation of the obligation. And when that subject-matter is shown to have become nonexistent, performance is excused and the contract terminates by operation of law. 6 R.C.L. 1005; *Hall v. Eversole’s Adm’r.*, 251 Ky. 296, 64 S.W. (2d) 691. As stated in Willis’ *Thornton on Oil and Gas*, sec. 243: ‘As the object in leasing oil or gas premises is to secure the oil or gas beneath the surface, as soon as it has been demonstrated that no oil, in case of an oil lease, or no gas, in case of a gas lease, is beneath the surface, or it does not exist in paying quantities, the lessee may abandon the



premises or his lease; or if the oil or gas becomes exhausted he may in like manner abandon them.' See, also, 40 C.J. 1034, 1055. \* \* \* \*

"The principle of declaring or considering a lease terminated and the royalty obligation cancelled when the subject-matter fails has been considered and applied in several cases where coal and other solid minerals were shown to have been exhausted or to be nonexistent. Many of them are reviewed in *Laurence E. Tierney Land Company v. Kingston-Pocahontas Coal Company*, 241 Ky. 101, 43 S.W. (2d) 517."

The primary object of the parties under the lease was to secure the development of the leased premises for either oil or gas. It was the duty of the lessee to use reasonable diligence to obtain production so that the benefits contemplated by the parties may be obtained. *Tucker v. Canfield*, (C.C.A. 8) 276 Fed. 385; 1 *Thornton Oil and Gas*, (Willis), Sec. 156, p. 273. But the circumstances may be such as to excuse the drilling of any test wells or of further wells. *Rice v. Ege*, (C.C.N.Y.) 42 Fed. 661; 1 *Thornton, Oil and Gas*, (Willis), Sec. 200, p. 353.

In *Swiss Oil Corporation vs. Riggsby*, 252 Ky. 374, 67 S.W. (2d) 30, an oil and gas lease for ten years, or as long as oil and gas was found in paying quantities and in quantities sufficient to transport, called for a minimum drilling of two wells or a royalty of \$200.00 a year. There were wells all around the 75-acre tract covered by the lease, but no wells were drilled upon the lease, the lessee paying \$200.00 a year in lieu of drilling. The lessee had 69 other gas wells in the field, but ceased marketing the gas ex-



cept in negligible quantities after production costs exceeded receipts. Thereupon, the lessee sought to surrender the lease. Finding that there was convincing proof that at the time of the attempted surrender, gas was no longer present in paying quantities or in quantities sufficient to transport, the court held that the lessors were not entitled to any damages or recovery. The court specifically held that there was an implied condition that futility of performance would avoid the obligation, (S.W. at p. 33-4):

“There is another principle widely recognized and applied to various classes of contracts. It is thus stated in *Texas Company v. Hogarth Shipping Company*, 256 U.S. 619, 41 S. Ct. 612, 614, 65 L. Ed. 1123: ‘It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.’

“Early English cases declaring and distinguishing the principles are discussed in *Singleton v. Carroll*, 6 J. J. Marsh, (29 Ky.) 527, 22 Am. Dec. 95, from which the conclusion was reached that the owner of a slave could not recover his value of his hirer on account of a failure to return him at the end of the term according to the contract because the slave had run away.

“This implied condition has come to be designated as impossibility of performance, although in some instances it is rather lax nomenclature, for in many cases it is not a matter of impossibility but of futility.

Supporting this view is the earlier case of *Ward vs. Daugherty*, 228 Ky. 326, 14 S.W. (2d) 1089, 1090. There, the oil and gas lease provided that in the event a test well being drilled on an adjoining farm should prove to be dry, the lessee should drill two test wells on the leased premises within a specified time. The well on the adjoining farm was dry and the lessee drilled one test well on the leased premises, which proved to be dry. Thereupon, lessee abandoned the lease without drilling the second well as agreed. The lessor was held to be entitled only to nominal damages, there being no allegation of the existence of oil or gas on the leased premises. The court declared, (SW at p. 1090):

“It is difficult to see how appellant’s lands would have been enhanced in value by drilling another test well, unless it proved to be a producer, or how he could be damaged by a failure to drill such well, unless it could be asserted that oil exists therein. It must not be overlooked that the contract is to be construed from the viewpoint of both parties and it is not to be thought that lessee was interested in testing appellant’s land except for the purpose of development.”

Commenting on this decision, the court, in *Swiss Oil Corporation vs. Riggsby*, 252 Ky. 374, 67 S.W. (2d) 30, stated (S.W. at p. 35)

“The obligation in that contract to drill the second well, which would have been futile, was

no less than the obligation in this contract to continue payment in lieu of drilling two wells, which would also have been futile.”

In *Woodworth vs. McLean*, 97 Mo. 325, 11 S. W. 43, McLean contracted for an interest in land, agreeing to sink a shaft 500 feet on the vein of ore cropping out on the claim. After sinking the shaft 330 feet he refused to carry it farther because the vein or mineral had given out. The court denied recovery on the owner's suit for damages for alleged breach of contract.

The presence in this lease of the express provisions as to surrender and cancellation gives greater reason and occasion for the existence of an implied condition that futility of performance by a lessee, who has acted in good faith and spent large sums of money in attempted development, will excuse further performance. It is upon this basis that we distinguish such cases as *Fidelity & Deposit Co. of Maryland v. Jones*, 256 Ky. 181, 75 S.W. (2d) 1057 and *Gibson v. Oliver*, 158 Pa. 277, 27 Atl. 961, heretofore relied upon by appellee.

Under the circumstances here involved, we urge that further performance on the part of the lessee was excused because the essential foundation of the contract was shown to have become non-existent subsequent to the formation of the contract.

### CONCLUSION

We submit that there has seldom been a more flagrant disregard of facts, a more patent refusal to heed the scientific findings within his own de-

partment, a more arbitrary refusal to abide by the express and implied terms of a contract of his own making, or a more obvious attempt to collect an additional bonus, than the refusal of the Secretary of the Interior to accept the lessee's applications for cancellation and surrender of this lease. The judgment below should be reversed and directions given for the entry of judgment for the defendants-appellants.

Respectfully submitted,

CORETTE & CORETTE,  
JOHN E. CORETTE, JR.,  
KENDRICK SMITH,

619 Hennessy Bldg.,  
Butte, Montana,

Attorneys for Defendants  
and Appellants.